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IN THE SUPREME COURT OF THE UNITED STATES

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PAUL EDWARD MAGILL,)
Petitioner,)
vs.) NO. 82-6733
STATE OF FLORIDA,)
Respondent.)

RESPONSE TO PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL
Tallahassee, Florida

Barbara Ann Butler
Assistant Attorney General
Suite 513
Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-3117

Counsel for Respondent

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF CASES	ii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE AND FACTS	1
REASONS WHY THE WRIT SHOULD BE DENIED	3
ARGUMENT I	
WHETHER THE IMPOSITION OF THE DEATH PENALTY UPON A YOUTH WHO WAS UNDER THE AGE OF EIGHTEEN AT THE TIME OF THE OFFENSE WOULD CONSTITUTE EXCESSIVE AND DISPROPORTIONATE PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS	3
ARGUMENT II	
WHETHER THE EXCLUSION FOR CAUSE OF A JUROR WHO EXPRESSED A CONSCIENTIOUS OBJECTION TO THE IMPOSITION OF THE DEATH PENALTY UPON YOUTHFUL OFFENDERS DEPRIVED PETITIONER OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS	5
ARGUMENT III	
WHETHER THE EXCLUSION OF PETITIONER'S PENALTY PHASE TESTIMONY REGARDING HIS REMORSE FOR THE ACT CONSTITUTES AN IMPROPER RESTRICTION UPON THE PRESENTATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS	6
ARGUMENT IV	
WHETHER THE AFFIRMANCE BY THE FLORIDA SUPREME COURT OF THE TRIAL COURT'S FINDINGS AS TO THE AGGRAVATING CIRCUMSTANCES PRIOR TO THE REMAND TO THE TRIAL COURT FOR A NEW SENTENCING HEARING VIOLATED PETITIONER'S EIGHT AND FOURTEENTH AMENDMENT RIGHTS	7
ARGUMENT V	
WHETHER THE FLORIDA SUPREME COURT IN AFFIRMING THE IMPOSITION OF THE DEATH PENALTY IN THE PRESENT CASE HAS ADOPTED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE TERM "ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL" AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS	9

ARGUMENT VI

WHETHER THE FLORIDA SUPREME COURT ERRED IN APPROVING THE USE OF THREE SEPARATE AGGRAVATING CIRCUMSTANCES ALL OF WHICH WERE PROVEN BY THE SAME EVIDENCE 12

ARGUMENT VII

WHETHER THE EXECUTION OF THE PETITIONER WOULD CONSTITUTE EXCESSIVE AND DISPROPORTIONATE PUNISHMENT IN VIEW OF THE OVERWHELMING MITIGATING CIRCUMSTANCES IN THIS CASE 14

CONCLUSION 15

CERTIFICATE OF SERVICE 15

TABLE OF CASES

	PAGE
Alvord v. State, 332 So.2d 533, 540 (Fla. 1975)	9,12
Beck v. Washington, 369 U.S. 541 (1962)	4,11
Cardinale v. Louisiana, 394 U.S. 437, 439 (1969)	5,7,
Delia v. Court of Common Pleas of Cuyahough County, 418 F.2d 205, 206 (6th Cir. 1969)	11
Dougan v. State, 398 So.2d 439 (Fla. 1981) cert. denied 102 S.Ct 367	8
Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)	4,5,14
Funchess v. State, 399 So.2d 352 (Fla. 1981) cert. denied 102 S.Ct. 493	8
Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 347 (1972)	9
Gardner v. Florida, 430 U.S. 349 (1977)	8
Gibson v. State, 351 So.2d 948, 949 (Fla. 1977)	12
Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) cert. denied 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977)	11,12
Howard v. Kentucky, 200 U.S. 164 (1906)	10,11
Illinois v. Gates, No. 81-430, 33 Cr.L. 3109 (June 8, 1983)	5,7
In Re Converse, 137 U.S. 624, 631 (1891)	11
In Re Gault, 387 U.S. 1 1967)	5
Knight v. State, 338 So.2d 201, 202 (Fla. 1977)	12
Lockett v. Ohio, 438 U.S. 586 (1978)	7,8,9
Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1959)	12
Magill v. State, 386 So.2d 1188 (Fla. 1980) as revised on denial of rehearing (September 8, 1980), cert. denied 450 U.S. 927 101 S.Ct. 1384, 67 L.Ed.2d 359	1,2,6,7, 8,9,13
Magill v. State, 428 So.2d 649 (Fla. 1983)	1,2,10,12,13
Magill v. Florida, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981)	3,5,12

Milwaukee Electric Railway and Light Company v. Wisconsin, 252 U.S. 100 (1920)	10,11
Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)	9,10,11,12
Provence v. State, 337 So.2d 783, 787, (Fla. 1976)	11,13
Songer v. State, 365 So.2d 696 (Fla. 1978) cert. denied, 441 U.S. 956 (1979)	8
Songer v. State, 365 So.2d 696 (Fla. 1978) rehearing denied	
State v. Dixon, 283 So.2d 1, 8 (Fla. 1978)	8,10
Tedder v. State, 322 So.2d 908, 910 (Fla. 1975)	10
Thompson v. State, 328 So.2d 1, 5 (1976)	10
Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981)	4,5,7
Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)	6
Woodward v. Wainwright, 556 F.2d 781 (5th Cir. 1977) rehearing denied 560 F.2d 1023 cert. denied, 434 U.S. 1088	5
Other Authority:	
§ 1257(3), 28 U.S.C	1
Rule 17, Florida Supreme Court Rules	3
§ 39.02 (5)(c), Florida Statutes	5
§ 191.141, Florida Statutes	8
§ 782.041, Florida Statutes	9
§ 921.141(5)(d)(f)(g) and (h), Florida Statutes	7,9,10,13
§ 921.141(3) and (6) Florida Statutes	4

OPINION BELOW

The opinion of the Supreme Court of the State of Florida in this cause was initially reported as Magill v. State 386 So.2d 1188 (Fla. 1980) as revised on denial of rehearing (September 8, 1980), cert. denied 450 U.S. 927 101 S.Ct. 1384, 67 L.Ed. 2d 359 (Hereinafter, Magill I). The opinion of the same Court on resentencing following remand is now reported as Magill v. State, 428 So.2d 649 (Fla. 1983). (Hereinafter, Magill II).

JURISDICTION

Respondent concedes that to the extent a substantial federal question was presented and disposed of by the Florida Supreme Court, jurisdiction would properly vest in this Court pursuant to 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States. It further involves 28 U.S.C. §1257(3), which provides:

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

The Florida statutory provision involved is Section 921.141, Florida Statutes (1979) which is appendixed to Petitioner's petition for writ of certiorari.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Petitioner's Statement of the Case insofar as it deals with the procedural aspects of the cause, but must take exception to the lengthy presentment of facts. Instead, Respondent adopts the following facts as set forth by the Supreme Court of Florida in its initial opinion:

> This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and a sentence of death.

> The defendant, Magill, seventeen years of age at the time, robbed a small store, abducted the female attendant, raped her, and then killed her. An indictment was returned on January 6, 1977, and defendant was arraigned on January 17, 1977, at which time the public defender was appointed to represent the defendant. On February 1, 1977, the court ordered an examination of defendant to determine his competency to stand trial. On March 4, 1977, the defendant filed a motion for continuance on the ground that he had not yet received the reports of the appointed psychiatrists. The reports of the psychiatrists were filed on March 8 and March 14. The defendant filed a notice of intent to rely upon the defense of insanity on March 16; on the same day he filed another motion for continuance on the ground that he had been unable to take the deposition of the examining psychiatrists. The trial began on March 21, 1977.
>
> The record clearly shows that the defendant first robbed the victim and kidnapped her while in the process of fleeing the site of the robbery. He then took the victim to a wooded area and raped her. As they were returning to the car after the rape, the victim begged that she not be injured. Defendant realized that she would be able to identify him, so he shot her three (3) times, 'twice in the head and once in the chest'. Defendant reaffirmed the details of a confession while on the stand at trial, although he attempted to recant the portion of his testimony where he stated that he had killed the victim to avoid identification. The jury obviously believed the confession and not the recantation. . . .the record shows that the victim was shot in the head and fell to the ground, after which the defendant deliberately shot her twice more, once in the head and once in the chese. The chest shot was at such close range that it left powder burns. The record is clear that the defendant had a cold, calculated design to effect the death of the helpless victim. This is evident from the number of times the defendant shot the victim with his .44 caliber pistol, the approximity of the muzzle of the pistol to the victim's chest, and the defendant's statement to the police that he shot her to avoid identification and make sure that she was dead.

Magill I at 1189, 1190-1191.

Respondent emphasizes that the conviction of first degree murder was addressed by the Florida Supreme Court in its initial opinion. (Magill I). The conviction was affirmed but the death sentence vacated. The cause was remanded with directions that the trial court make proper findings of fact and conclusions of law and thereafter impose an appropriate sentence. Magill I; Magill II at 651. Following the initial opinion, the Petitioner immediately sought certiorari review in this Court by petition filed December 5, 1980. Magill v. Florida, No. 80-5852. (See Appendix).

Petitioner raised three (3) grounds in this prior certiorari petition, two of these grounds are raised again in the instant petition. Argument Two (2)

herein, concerning the alleged error in excluding a juror for cause, appeared in the earlier petition as ground one (1). (See Appendix). The instant ground three (3), concerning the alleged error in excluding Petitioner's testimony on remorse during the penalty phase of the bifurcated trial, appeared in the earlier petition for writ of certoriari as argument two (2). Petitioner's first writ request was denied by this Court on February 23, 1981. Magill v. Florida, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981).

Respondents respectfully submit that arguments two (2) and three (3) of the instant petition have already received the careful and considered attention of this Court. The content of both petitions is identical when reviewed. (See Appendix). Arguments two (2) and three (3) of the instant petition have been previously rejected by this Court and therefore are improper grounds upon which to seek certiorari review. Petitioner has failed to demonstrate new authority or justification which would alter this Court's prior decision not to exercise its discretionary power of review.

REASONS WHY THE WRIT SHOULD BE DENIED.

Respondent submits that the writ should not issue as requested as Petitioner has failed to comply with the requirements of this Court in considering review on certiorari. Rule 17, Supreme Court Rules. The petition is devoid of argument or discussion as to why this Court should exercise its discretionary review. Id. Petitioner has failed to establish a conflict of decisions with another court on a specific federal question. Further, Respondent submits the petition should be denied for the following reasons and cited authority:

ARGUMENT I

WHETHER THE IMPOSITION OF THE DEATH PENALTY UPON A YOUTH WHO WAS UNDER THE AGE OF EIGHTEEN AT THE TIME OF THE OFFENSE WOULD CONSTITUTE EXCESSIVE AND DISPROPORTIONATE PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Respondent submits that this ground should not be reviewed inasmuch as the argument was not presented in a federal constitutional posture to the Florida Supreme Court. Petitioner maintains the instant issue was raised during

oral argument in the appeal following remand. (See, Petition p. 4). The undersigned, who was counsel of record for Respondent and was present at oral argument, insists that the instant constitutional issue was not raised or argued to the Florida Court. Petitioner raised the question of age solely in the context of a mitigating circumstance to outweigh the aggravating circumstances found by the trial court.[1] Section 921.141 (3) and (6)(g), Florida Statutes (1979).

Moreover, neither the argument raised herein, nor a federal constitutional violation, was argued by Petitioner in brief before the Florida Supreme Court. (See, Appendix). At oral argument, counsel, in presenting the mitigation argument informed the Florida Supreme Court that Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) was pending in this Court and was expected to hold the imposition of the death penalty upon a juvenile to be unconstitutional.[2] Raising an entirely new ground at oral argument is contrary to established appellate procedures in Florida. Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962), rehearing denied, 370 U.S. 965.

Respondent submits that the purported federal question was not presented to the Florida Supreme Court. In Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981) a petition for writ of jurisdiction was dismissed where the record failed to disclose the federal question was presented to, and disposed of by, the Georgia Supreme Court. Justice White, writing for this Court, stated:

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately present in the state system.

Id. at 496, 397 (citations omitted). In Webb, petitioner used the phrase "full faith and credit" at several points in the proceedings. In dismissing the cause, this Court noted that at no time did the Petitioner "cite to the Federal

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1 The dissenting opinion by Mr. Justice Boyd addresses age from this perspective, not from the point of a federal constitutional violation as Petitioner urges.

2 Following oral argument, Petitioner failed to supplement the record with Eddings v. Oklahoma as additional authority. When this Court's opinion issued, undersigned counsel filed notice of supplemental authority informing the state court that Petitioner's statement concerning the scope of review was inaccurate. At no time following oral argument or the issuance of the opinion by the Florida Supreme Court, did Petitioner move for rehearing or include the instant argument in his pleadings.

Constitution or to any cases relying on the Full Faith and Credit Clause of the United States Constitution". Id. at 496. 396. Here the "clear implication" of the federal claim is not apparent as the claim appears nowhere in the record. See also, Cardinale v. Louisiana, 394 U.S. 437 (1969).

As this Court recently stated in Illinois v. Gates, No. 81-430, 33 Cr.L. 3109 (June 8, 1983), jurisdiction does not exist unless a federal question has been both raised and decided in the state court below. A jurisdictional barrier to review exists for claims "not pressed nor passed upon" in state court. See also, Cardinale v. Louisiana, 394 U.S. 437, 439 (1969). Respondents submit that Petitioner's passing reference to Eddings v. Oklahoma is insufficient to raise the federal constitutional question which Petitioner seeks to have resolved by this Court.

It would be improper for this Court to determine the automatic age below which the death penalty cannot be applied without violating the restrictions against cruel and unusual punishment as provided by the Eighth and Fourteenth Amendments of the United States Constitution. As Petitioner acknowledges, there is no absolute right to be treated as a juvenile offender. Woodward v. Wainwright, 556 F.2d 781 (5th Cir. 1977) rehearing denied 560 F.2d 1023 cert. denied, 434 U.S. 1088; In Re Gault, 387 U.S.1 (1967). The Florida Legislature has deemed the privilege to be treated as a juvenile offender to be waived upon the commission of certain violent crimes. Section 39.02(5)(c), Florida Statutes. Petitioner has not cited a case showing such legislature demarcation to be improper nor has he established a right to be treated as a juvenile. Likewise, Petitioner has failed to establish conflict among existing case law.

ARGUMENT II

WHETHER THE EXCLUSION FOR CAUSE OF A JUROR WHO EXPRESSED A CONSCIENTIOUS OBJECTION TO THE IMPOSITION OF THE DEATH PENALTY UPON YOUTHFUL OFFENDERS DEPRIVED PETITIONER OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS

Respondents submit that this identical issue was presented pursuant to an earlier petition for writ of certiorari and was denied by this Court. Magill v. Florida, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981).

Petitioner has failed to provide additional argument or factual circumstance which could reasonably convice this Court that its initial assessment was incorrect. Should this Court determine otherwise, Respondent incorporates the argument and authority advanced in the earlier petition. (See Appendix)

Respondent notes however that the excusal of Juror Bonner occurred because the woman admitted Petitioner's age might preclude recommendation of the death penalty. Inasmuch as the death penalty may be imposed upon a juvenile under Florida law, provided the factual circumstances warrant such a sentence, Juror Bonner was admitting that she could not apply the law to the facts as required. This is a legitimate ground upon which to excuse a prospective juror. Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

ARGUMENT III

WHETHER THE EXCLUSION OF PETITIONER'S PENALTY PHASE TESTIMONY REGARDING HIS REMORSE FOR THE ACT CONSTITUTES AN IMPROPER RESTRICTION UPON THE PRESENTATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Again the argument asserted by Petitioner is nearly identical [3] to that presented in the earlier petition for writ of certiorari. Respondent emphasizes that this cause was not remanded for a new penalty phase hearing wherein a jury would render a sentencing recommendation. The cause was remanded for resentencing due to the trial court's failure to specify which, if any, mitigating circumstances were considered in reaching the sentence imposed. Magill I at 1191. At the trial level Petitioner did not even request a second penalty phase hearing. He requested only a hearing in mitigation which was provided.

The instant allegation of error was raised in the initial direct appeal, but was not raised on direct appeal of the sentence following remand. On direct appeal, Petitioner's argument did not refer to a federal constitutional violation Petitioner claimed error in a trial court ruling to a prosecutor's objection. (See Appendix). Petitioner's argument below was framed solely as an abuse of judicial discretion: as such, a violation of state law and procedure. The Florida Supreme Court did not address the issue in the context of the federal ramifications expressed

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3 The earlier petition is several paragraphs longer.

herein. Magill I at 904. There is no support to be found for Petitioner's claim that the federal question alleged herein was raised and decided below. Respondent submits that this Court is without jurisdiction to review the instant argument. Webb v. Webb; Cardinale v. Louisiana; Illionois v. Gates.

The Court found the "error, if any, if not allowing the defendant to once again express remorse is harmless." Id. This is because Petitioner was permitted to establish his remorse as a mitigating factor at several points during the penalty phase. Thus even assuming arguendo that the trial judge was incorrect in eventually excluding the testimony, the evidence was permitted in the record and before the jury panel. Accordingly, there cannot be a violation of Lockett v. Ohio, 438 U.S. 586 (1978). Petitioner has failed to establish a conflict of decisions which would justify acceptance of certiorari review by this Court.

ARGUMENT IV

WHETHER THE AFFIRMANCE BY THE FLORIDA SUPREME COURT OF THE TRIAL COURT'S FINDINGS AS TO THE AGGRAVATING CIRCUMSTANCES PRIOR TO THE REMAND TO THE TRIAL COURT FOR A NEW SENTENCING HEARING VIOLATED PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

In imposing the original capital sentence, the trial court found the following aggravating circumstances:

> (2) The capital felony of Murder was committed while the Defendant was engaged in the commission of, or flight after committing, the crime of Robbery and Rape. [Fla. Stat. §921.141(5)(d)]
>
> (3) The said capital felony was especially heinous, atrocious and cruel, as there existed no logical compelling reason for the defendant to kill said robbery and rape victim and same was the heinous act of a person evincing a depraved criminal mind. [Fla. Stat. §921.141(5)(h)]
>
> (4) The said capital felony was committed in connection with the crime of robbery which was perpetrated for pecuniary gain [Fla. Stat. §921.141(5)(f)]
>
> (5) The court finds no mitigating circumstances which outweigh the aforementioned aggravating circumstances.

These findings were contained in written finding of fact entered April 25, 1977. It was inclusion of the aforementioned category five (5), not the finding of erroneous aggravating factors, which necessitated remand in the instant cause. The Florida Supreme Court stated:

> It is apparent that the trial judge used a reasoned judgment and, in the absence of sufficient mitigating circumstances, the death penalty was justified. The Court found that there were 'no mitigating circumstances which outweigh the aforementioned aggravating circumstances.' [Quoting from the aforementioned category (5) of the trial court's Finding of Fact] However, the Court did not specifically list the mitigating circumstances which he may or may not have considered. Even though the trial judge may have considered some mitigating circumstances, he is charged with the further responsibility of articulating them, so as to provide this Court with the opportunity of giving a meaningful review of the sentence of death.

Magill I at 1191. (emphasis added). See also, State v. Dixon, 283 So.2d 1, 8 (Fla. 1978).

Petitioner's remand was for the express purpose of allowing the trial judge the opportunity of including proper findings of fact concerning the mitigating factors considered, if any, and then imposing an appropriate sentence. This directive is consistent with the controlling statutory provision. The Florida Supreme Court's initial weighing process, pursuant to §191.141, Florida Statutes, was precluded only by the trial court's failure to enumerate which, if any, mitigating circumstances were considered. Magill I at 1191.

The remand in the instant cause is similar to remands pursuant to Gardner v. Florida, 430 U.S. 349 (1977) in which information considered by the trial court unbeknownst to a defendant remains unrebutted. See also Songer v. State, 365 So.2d 696 (Fla. 1978) cert. denied 441 U.S. 956 (1979); Funchess v. State, 399 So.2d 352 (Fla. 1981) cert. denied 102 S.Ct. 493 and Dougan v. State, 398 So.2d 439 (Fla. 1981), cert. denied 102 S.Ct. 367. In such remands, the only appropriate question is the rebuttal of the undisclosed information. Similarily, the instant remand was not for the purpose of conducting an entirely new sentencing proceeding. This would have necessitated convening a new advisory jury for the penalty phase of a bifurcated trial. Songer v. State. The directive of the Florida Supreme Court was specific.

In raising the issue in the Florida courts, Petitioner claimed a violation of Lockett v. Ohio, which required consideration of an offender's character as an indespensible part of the sentencing process in a capital case. Petitioner complained that comment on the aggravating, without regard to the mitigating,

factors was improper. He argued the endorsment of the aggravating factors as "reasoned judgment" violated the totality of the circumstances standard. Lockett v. Ohio; Alvord v. State, 322 So.2d 533, 540 (Fla. 1975). What Petitioner failed to recognize then, and overlooks now, is the aggravating factors found by the trial judge are amply supported by the record. There is no question that Petitioner robbed, raped and murdered the victim. As noted by Petitioner, the Florida Supreme Court did find "reasoned judgment" by the trial court in reaching the aggravating factors. Magill I at 1191. However the appellate court's full comment has been overlooked:

> It is apparent that the trial judge used a reasoned judgment and, in the absence of sufficient mitigating circumstances, the death penalty was justified.

Magill I at 1191. (Emphasis added). Had the trial judge included which, if any, mitigating factors were considered, the Florida Supreme Court could have completed its evaluation process in 1980. Petitioner has failed to establish a substantial federal question or to affirmatively indicate how this Court has jurisdiction over this point.

ARGUMENT V

WHETHER THE FLORIDA SUPREME COURT IN AFFIRMING THE IMPOSITION OF THE DEATH PENALTY IN THE PRESENT CASE HAS ADOPTED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE TERM "ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL" AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS

In response to Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 347 (1972), the Florida Legislature adopted new statutes authorizing a sentence of death upon conviction for murder in the first degree. Sections 782.04(1), 921.141, Florida Statutes. The constitutionality of Florida's new provisions was specifically endorsed by this Court in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

The State of Florida rejects Petitioner's argument that the Florida Supreme Court's varied interpretation of the concept of "heinous, atrocious and cruel" in the seven years since Proffitt has rendered the factor vague and overbroad. We further disagree that the finding was improper under the instant facts simply because it was not found in other cases with purportedly similar factual circumstances.

In addressing this same argument, the Florida Supreme Court stated:

> Appellant's argument ignores that there are discernable distinctions in the facts of the cases which he cites. It is not merely the specific and narrow method in which a victim is killed which makes a murder heinous, atrocious, and cruel; rather, it is the entire set of circumstances surrounding the killing.
>
> . . .
>
> There can be no mechanical litmus test established for determining whether this or any aggravating factor is applicable. Instead, the facts must be considered in light of prior cases addressing the issue and must be compared and contrasted therewith and weighed in light thereof. Then, if the killing and its attendant circumstances do not warrant the finding of heinousness, atrociousness, and cruelty, it will be stricken. Otherwise, assuming that it is warranted in light of earlier cases and that the trial judge used the reasoned judgment which is so necessary, the finding will not be disturbed.
>
> We have provided guidance for determining whether section 921.141(5)(h) is applicable. As was noted in State v. Dixon, 283 So.2d 1 (Fla. 1978):
>
> > It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> 283 So.2d at 9. Since Proffitt, our application of the above reasoning has not rendered the statute unconstitutionally vague and overbroad.

Magill II at 651.

In Proffitt, this Court affirmed Florida's standard of review and concluded that formulation of a rigid objective test was unnecessary. Id. at 258, 926. Thus even though the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ[4], absolute unanimity is not required. Absolute uniformity of judicial decisions is neither possible nor is it desirable. Howard v. Kentucky, 200 U.S. 164, 50 L.Ed. 421 (1906); Milwaukee Electric Railway and Light Company v. Wisconsin,

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[4] Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); accord, Thompson v. State, 328 So.2d 1, 5 (1976).

252 U.S. 100 (1920); Beck v. Washington.

In Howard, this Court stated:

> . . . a 'state cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction. . .'

Id. at 173 quoting In Re Converse, 137 U.S. 624, 631 (1891). Similarly in Beck v. Washington, this Court held:

> . . . petitioner's argument here come down to a contention that Washington law was misapplied. Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . . Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question.

Id. at 554-555, 110, citing to Milwaukee Electric.

Thus, the mere fact that a tribunal reaches different conclusions as to two seemingly similar cases does not establish a denial of federal constitutional protections absent a showing of intentional or purposeful discrimination or arbitrariness. Id. See also, Delia v. Court of Common Pleas of Cuyahougha County, 418 F.2d 205, 206 (6th Cir.1969); Provence v. State, 337 So.2d 783 787, (Fla. 1976) cert. denied 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed. 2d 1065 (1977). Proffitt v. Florida; Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

In following this legal concept, the Florida Supreme Court has stated that reasonable persons can differ over decisions and factual circumstances. Provence v. State at 787. However, difference in interpretation does not automatically translate into arbitrariness. Petitioner's argument is that a violation of federal constitutional rights occurs upon the finding of an unrelated case in which the Florida Supreme Court rejected a finding of heinous, atrocious and cruel under similar facts. Petitioner maintains such "discrepancy" renders a capital sentence arbitrary and capricious. Such logic simply does not allow for independent review of the total circumstances which has repeatedly distinguished the Florida capital sentence statute from that of other states. Proffitt v. Florida. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49

L.Ed.2d 859 (1980). Respectfully, Petitioner's argument fails to assert sufficient violation to warrant review.

Moreover, the application of "heinous, atrocious and cruel" to these factual circumstances is no different from the application found in Alford v. State, 307 So.2d 433 (Fla. 1975) and numerous other Florida cases. Here as in Alford, the victim was kidnapped and raped prior to being murdered. Petitioner's tape-recorded confession was played at trial; Petitioner also testified as to the details of the confession and attempted to recant the portion wherein he stated he killed the victim to avoid identification. Magill I at 1190-1191. In the confession, Petitioner admitted that the victim begged that she not be injured. Knight v. State, 338 So.2d 201, 202 (Fla. 1976); Gibson v. State, 351 So.2d 948, 949 (Fla. 1977); Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1959). The record reflects the victim's cognition and anticipation of impending death at the hands of Petitioner. Her fear and distress prior to her death is evident. The Florida Supreme Court has held that similar treatment constitutes "exceedingly cruel treatment", "continuous strain", fear for life at every instant and properly supports a finding of heinous, atrocious and cruel. Knight v. State at 202.

Case law may appear to offer untoward results when viewed superficially, however, when given the indepth consideration and analysis during the briefing, argument and review stages of the appellate process, "discernable distinctions" emerge. Magill II at 651. The "specific and detailed guidance" of the Florida statute as well as the objective review afford by the Florida Supreme Court has distinguished Florida's death penalty statute as constitutional. Proffitt v. Florida; Gregg v. Georgia. Petitioner has failed to advance an argument to the contrary. Thus the instant request should be denied.

ARGUMENT VI

WHETHER THE FLORIDA SUPREME COURT ERRED IN APPROVING THE USE OF THREE SEPARATE AGGRAVATING CIRCUMSTANCES ALL OF WHICH WERE PROVEN BY THE SAME EVIDENCE

Petitioner charges the aggravating circumstances herein are supported by the same evidence and therefore are cumulative. We disagree. The uncontroverted record in this cause shows that Petitioner first robbed the

young cashier, then kidnapped her in the process of fleeing the robbery; Petitioner raped the girl during her abduction and committed the murder in order to flee the scene of the rape. Magill I at 1190. Thus the circumstances vary significantly from the simplistic version submitted by the Petitioner.

Contrary to Petitioner's assertion, the trial judge was not required to view the three (3) findings as a single aggravating circumstance. Only one aspect of the crime scenario was committed for pecuniary gain, the robbery. Provence v. State. The rape was a separate and distinct criminal act. The relevant facts herein reveal that the helpless victim was killed in order to facilitate Petitioner's flight from the rape which was separated in time from the robbery. By his own admission, Petitioner did not wish to be identified. Magill I at 1190-1191. The rape did not involve pecuniary gain and Section 921.141(5)(f), Florida Statute, is not applicable with "flight" Thus both subsection (d) and (f) may be properly applied to Petitioner's cause.

In initially affirming the aggravating factors, the Florida Supreme Court stated:

> . . . Defendant first robbed the victim and kidnapped her while in the process of fleeing the site of the robbery. He then took the victim to a wooded area and raped her. As they were returning to the car after the rape, the victim begged that she not be injured. Defendant realized that she would be able to identify him, so he shot her three times, 'twice in the head and once in the chest.' Defendant reaffirmed the details of a confession while on the stand at trial, although he attempted to recant the portion of his confession where he stated that he had killed the victim to avoid identification. The jury obviously believed the confession and not the recantation.
>
> . . .
>
> The record shows that the victim was shot in the head and fell to the ground, after which defendant deliberately shot her twice more, once in the head and once in the chest. The chest shot was at such close range that it left powder burns. The record is clear that defendant had a cold, calculated design to effect the death of the helpless victim. This is evident from the number of times defendant shot the victim with his .44 caliber pistol, the proximity of the muzzle of the pistol to the victim's chest, and defendant's statement to the police that he shot her to avoid identification and made sure that she was dead.

Magill at 1190-1191. The state supreme court did not address the instant argument on appeal following remand for procedural reasons.[5] Magill II at 652. Petitioner has not claimed error in this regard in the Florida courts.

---

[5] Petitioner asserts that the dissenting opinion of Mr. Justice Boyd "directly addresses" this issue. However, Mr. Justice Boyd agrees with the positions of both the State and Petitioner. Magill II at 653-654. The Justice is obviously influenced by Petitioner's age. Id. at 654.

ARGUMENT VII

WHETHER THE EXECUTION OF THE PETITIONER WOULD CONSTITUTE EXCESSIVE AND DISPROPORTIONATE PUNISHMENT IN VIEW OF THE OVERWHELMING MITIGATING CIRCUMSTANCES IN THIS CASE

In reaching and evaluating the instant circumstances, the trial court found two statutory and one non-statutory factors in mitigation of Petitioner's capital sentence. However when these three (3) factors were viewed in the totality of the circumstances as required by Florida law, the trial judge concluded the mitigating circumstances were insufficient to outweigh the aggravating circumstances; hence after full review, the judge concluded the jury recommendation of a sentence of death should be followed.

Petitioner seeks to have this Court reevaluate the factual circumstances and reweigh the factors enumerated. He contends age alone is a sufficient ground to reverse the death sentence. In Eddings v. Oklahoma, this Court clearly stated its role was not to reweigh the aggravating and mitigating factors to determine the appropriateness of the sentence. Id. at 117, 12. Remand occurred in Eddings when the Oklahoma state courts failed to consider the age, background and emotional state of the defendant. Here, Petitioner was afforded full opportunity to present evidence as to these factors. Further the Eddings factors, especially Petitioner's age, were considered by the Florida courts when evaluating and weighing the propriety of a capital sentence.

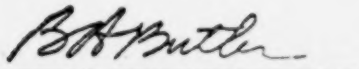
This Court requires an objective evaluation of all relevant factors in imposition the ultimate penalty. Indeed in Eddings, this Court opined that "such evidence [age] may be given little weight", however it must be considered. Id. at 115. Respondent submits that a violation of federal constitutional protections did not occur. All relevant mitigating factors were duly considered by Florida courts in imposing Petitioner's sentence.

CONCLUSION

Respondent respectfully submits that Petitioner has offered insufficient argument of the constitutional infirmity of his cause. Further, the petition fails to set forth as required by the Rules of this Court, a conflict of decision or a substantial federal question which would merit further review. Should this Court conclude otherwise, the State of Florida submits the instant writ should be granted and the opinion of the Florida Supreme Court affirming Petitioner's sentence of death should be summarily affirmed.

Respectfully submitted,

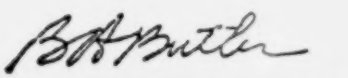
JIM SMITH
ATTORNEY GENERAL



BARBARA ANN BUTLER
Assistant Attorney General
Suite 513
Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-3117

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Philip J. Padavano, Esquire, 1020 E. Lafayette Street, Suite 201, P. O. Box 873, Tallahassee, Florida 32302, this 22nd day of June, 1983.



BARBARA ANN BUTLER
Assistant Attorney General

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

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PAUL EDWARD MAGILL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

NO. 82-6733

APPENDIX TO
RESPONSE TO PETITION
FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL
Tallahassee, Florida

Barbara Ann Butler
Assistant Attorney General
Suite 513
Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-3117

Counsel for Respondent

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IN THE SUPREME COURT OF FLORIDA

PAUL EDWARD MAGILL,

Appellant,

vs.

CASE NO. 51,699

STATE OF FLORIDA,

Appellee.

FILED

JUN 17 1981

SID J. WHITE
CLERK SUPREME COURT

By _____
Chief Deputy Clerk

APPELLANT'S BRIEF

PHILIP J. PADOVANO
and
MARY M. PICCARD
Post Office Box 873
Tallahassee, Florida 32302
(904) 224-3636

ATTORNEYS FOR APPELLANT

RECEIVED
JUN 22 1981
ATTORNEY GENERAL
DAYTONA BEACH, FLA.

TOPICAL INDEX

PRELIMINARY STATEMENT..... 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

POINT ONE

THE TRIAL COURT ERRONEOUSLY FOUND AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL..... 3

POINT TWO

THE TERM "HEINOUS, ATROCIOUS AND CRUEL" HAS BEEN RENDERED UNCONSTITUTIONALLY VAGUE AND OVERBROAD DUE TO THE WIDE VARIETY OF SITUATIONS IN WHICH IT HAS BEEN APPLIED..... 7

POINT THREE

THE TRIAL COURT ERRED IN FINDING THREE SEPARATE AGGRAVATING CIRCUMSTANCES ALL OF WHICH WERE PROVED BY THE SAME EVIDENCE..... 10

POINT FOUR

THIS COURT SHOULD VACATE THE SENTENCE OF DEATH AND REMAND THE CASE WITH INSTRUCTIONS TO IMPOSE A SENTENCE OF LIFE IMPRISONMENT..... 13

POINT FIVE

IF THE COURT DOES NOT VACATE THE DEATH SENTENCE, THE CASE SHOULD BE RECOMMENDED FOR A COMPLETELY NEW SENTENCING HEARING..... 15

CONCLUSION..... 16

CERTIFICATE OF SERVICE..... 17

TABLE OF AUTHORITIES

Alvord v. State, 322 So.2d 533 (Fla. 1975).....6,9

Brown v. State, 381 So.2d 690 (1980).....9

Demps v. State, Case No. 54,249, 6 F.L.W. 76,
(Fla. January 8, 1981).....8

Dixon v. State, 283 So.2d 1 (Fla. 1978)..... 3,4,6

Flemming v. State, 374 So.2d 954 (Fla. 1979)..... 6,8,15

Ford v. State, 374 So.2d 496 (Fla. 1979)..... 9

Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346,
92 S.Ct. 2726 (1972).....10

Hargrave v. State, 366 So.2d 1 (Fla. 1979)..... 9,13

Holmes v. State, 374 So.2d 944 (Fla. 1979)..... 9

Kampff v. State, 371 So.2d 1007 (Fla. 1979)..... 14

King v. State, 390 So.2d 315 (Fla. 1980)..... 4

Lewis v. State, 377 So.2d 640 (Fla. 1980)..... 5,6

Lewis v. State, Case No. 50,851, 6 F.L.W. 239,
(Fla. April 2, 1981)..... 3,4

Maggard v. State, Case No. 51,614, 6 F.L.W. 333,
(Fla. May 7, 1981)..... 3

Magill v. State, 383 So.2d 901 (Fla. 1980)..... 2,4,6,9

Perry v. State, Case No. 53,003, 6 F.L.W. 18,
(Fla. Dec. 18, 1980)..... 11,12

Proffitt v. State, 428 U.S. 242, 49 L.Ed.2d 913,
96 S.Ct. 2960 (1976)..... 7,8,9

Provence v. State, 337 So.2d 783 (Fla. 1976)..... 11,12,13

Raulerson v. State, 358 So.2d 826 (Fla. 1978)..... 7,8

Riley v. State, 366 So.2d 19 (Fla. 1979)..... 11

Ross v. State, 386 So.2d 1191, (Fla. 1980).....11

Rutledge v. State, 374 So.2d 975 (Fla. 1979) 4

Tedder v. State, 322 So.2d 908 (Fla. 1975)..... 14,15

Thompson v. State, 389 So.2d 197 (Fla. 1980)..... 4

Washington v. State, 362 So.2d 658 (1978)..... 8

Williams v. State, 386 So.2d 538 (Fla. 1980)..... 3

OTHER AUTHORITIES

§ 921.141(5) Fla. Stat. (1979)..... 1,3,4,5,6,7,8,11, 13,14

§ 921.141(6) Fla. Stat. (1979)..... 1

PRELIMINARY STATEMENT

The record on appeal consists of a four volume transcript which will be referred to as "R" followed by the appropriate page number and a record of the resentencing hearing which will be referred to as "RR" followed by the appropriate page number. The record of the original sentencing proceeding will be referred to as "SR" followed by the appropriate page number.

Paul Edward Magill will be referred to as either "Appellant" or "Defendant", the State of Florida will be referred to as "the State".

STATEMENT OF THE CASE

After a jury trial, the Appellant was found guilty as charged of the premeditated murder of Karen Sue Young (R-492). The trial judge accepted the recommendation of death made by the jury. (SR-89).

The case was affirmed on direct appeal to the Florida Supreme Court on May 8, 1980, Case No. 51,699. That opinion was published in advance sheets at 383 So.2d 901 (Fla. 1980) but was not printed in the bound volume because it was remanded. However, it is cited in this Brief as it appeared in the advance sheets.

At the resentencing hearing, the trial court found that four aggravating circumstances under §921.141(5) were applicable and three mitigating circumstances under §921.141(6) existed, and resentenced the Appellant to death. (RR-14-16).

This appeal was timely filed to review only the issues arising out of the resentencing.

STATEMENT OF THE FACTS

Appellant adopts the statement of the facts as set forth in Appellant's Brief in Magill v. State, Case No. 51,699.

POINT ONE

THE TRIAL COURT ERRONEOUSLY FOUND AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

In sentencing the Appellant to death, the trial court found as an aggravating circumstance that the murder was especially heinous, atrocious and cruel pursuant to Section 921.141(5)(h) Fla. Stat. (1979). This finding was erroneous because there was no showing that the actual commission of the felony was accompanied by such additional acts as to set it apart from the norm of capital felonies.

The term heinous, atrocious and cruel was succinctly defined by this Court in Dixon v. State, 283 So.2d 1 (Fla. 1978). In that case, the Court stated:

> "...It is our interpretation that heinous means extremely shocking or evil, that atrocious means outrageously wicked or shockingly vile; that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

This definition has frequently been reiterated and the Court has not withdrawn from the position. Maggard v. State, Case No. 51,614, 6 F.L.W. 333, (Fla. May 7, 1981), Lewis v. State, Case No. 50,851, 6 F.L.W. 239, (Fla. April 2, 1981), Williams v. State, 386 So.2d 538 (Fla. 1980).

The kinds of acts which set a murder apart, and make it heinous, atrocious and cruel vary significantly from case to case. However, the Court has held that an ordinary murder by shooting is not, as a matter of law, heinous, atrocious and cruel. The fact that a murder was cold, calculated or senseless does not cause it to rise to the level of being especially heinous,

atrocious and cruel. Lewis v. State, supra, Williams v. State, supra.

Cases in which the Court has upheld an application of subsection (5)(h) involved situations where the victim suffered extensively from the intentional acts of the defendant. In Thompson v. State, 389 So.2d 197, (Fla. 1980), the defendant kidnapped, raped and tortured the victim for hours until she died of shock and loss of blood. In King v. State, 390 So.2d 315 (Fla. 1980), the victim's body was found with burns, bruises, and brain hemorrhage, stab wounds, a broken neck, and her vagina had been torn with knitting needles. The facts in Rutledge v. State, 374 So.2d 975 (Fla. 1979) were even more appalling. In that case, the State had a 23 minute tape recording of the victims, a mother and 3 children, screaming and begging for mercy while the defendant butchered them and taunted them with vile language.

Certainly these cases are extreme and the Court has applied subsection (5)(h) on facts not so obviously heinous, atrocious and cruel, but they indicate the types of acts which the legislature and this Court intended to be present when that aggravating circumstance is applied.

The acts of the defendant in this case simply do not rise to the level of warranting the application of subsection (5)(h) in light of the definition of that section in Dixon, and the subsequent applications of the term. The trial court found that this murder was especially heinous, atrocious and cruel, because there was no logical or compelling reason for the defendant to kill the victim. (RR-14-15).[1] This finding can hardly be said to show

[1] The trial court did not find that the aggravating circumstance in section 921.141(5)(e) (the capital felony was committed for the purpose of avoiding arrest) was present in this case. Therefore, there are no grounds for discussing that section as the Court did in Magill v. State, 383 So.2d 901 (Fla. 1980).

that the murder was set apart from the norm when in fact, it is questionable whether any first degree murder could be called logical or compelling. A review of the evidence will show that nothing took place which justifies labeling this murder so heinous as to set it apart from any other premeditated murder. The evidence of the events that took place during the commission of the murder comes mainly from the defendant's statement. He said that as they were walking back to the car he shot her three times. The first shot was in the head, after which she "kind of grunted a little" and fell to the ground. (TR-352). He then shot her in the chest and according to him, he shot her again in the head. (TR-352-353).

The coroner's report substantiated the defendant's version except that the evidence showed that the victim had only been shot twice. (TR-378).

The dead body of Sharon Young was found very soon after the shooting, so soon in fact that a cigarette presumably left by the defendant was still smouldering in the vicinity of the body. (TR-321). This, along with the fact that she never cried out or indicated that she knew what was happening shows that Karen Young died quickly and painlessly of gunshot wounds.

As pointed out at page 3 of this Brief, an ordinary killing by gunshot is not heinous, atrocious and cruel. That the acts of the defendant in this case do not warrant the application of subsection (5)(h) is further supported by Lewis v. State 377 So.2d 640 (Fla. 1980). In that case, the defendant shot the victim once in the chest and several more times in the back as she was attempting to escape. In Lewis, the victim must have known what was happening to her, and felt the pain of the shots, yet the Court hald that the murder was not especially heinous. Surely if the

killing in Lewis did not warrant application of subsection (5)(h), the killing in this case did not.[2]

The burden is on the State to prove that the aggravating circumstances in §921.141(5) are applicable. State v. Dixon, supra. It is submitted that the State in this case did not meet this burden in regard to the application of subsection (5)(h). There is no evidence that the actual commission of the murder was accompanied by acts which set it apart from the norm. There is no evidence that the victim suffered or that the defendant intended to inflict a high degree of pain with utter indifference or enjoyment of the suffering of others. Certainly this murder was not unnecessarily torturous, on the contrary, this murder was a quick and as painless as any murder can be.

As this Court has stated, all senseless killings are appalling, however, the law must be unemotionally applied to the facts. Flemming v. State, 374 So.2d 954 (Fla. 1979). The facts of this case do not warrant a finding that this murder was especially heinous, atrocious and cruel. Therefore, the trial court's finding that §921.141(5)(h) existed should be reversed.

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[2] When this case was previously before the Court, the finding of the trial judge that the murder was especially heinous, atrocious and cruel was sustained based on Alvord v. State, 322 So.2d 533 (Fla. 1975), Magill v. State, 383 So.2d 901 (Fla. 1980). In Alvord, three victims, a grandmother, mother and a daughter, were tied up and strangled with a cord one by one. Certainly, a finding that that murder was heinous, atrocious and cruel was reasonable. However, it should not be compared to the facts in this case.

POINT TWO

THE TERM "HEINOUS, ATROCIOUS, AND CRUEL" HAS BEEN RENDERED UNCONSTITUTIONALLY VAGUE AND OVERBROAD DUE TO THE WIDE VARIETY OF SITUATIONS IN WHICH IT HAS BEEN APPLIED.

Regardless of whether Section 921.141(5)(h) could be applied based on the facts in this case, the meaning of that section has become so vague and overbroad that it is now unconstitutional. The term "especially heinous, atrocious and cruel" was upheld against a challenge of vagueness and overbreadth by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 49 L.Ed 2d 913, 96 S.Ct.2960 (1976). However, the reason that the term was upheld was that the Florida Supreme Court construction of the term cured whatever constitutional defects may have existed. Id at 255. Appellant respectfully submits that the cases interpreting Section 921.141(5)(h) since Proffitt are so varied that the meaning of "especially heinous, atrocious and cruel" is no longer clear to a person of ordinary intelligence.

The definition of the term "especially heinous, atrocious, and cruel" as it existed at the time of Proffitt was expounded upon in detail in Point I of this Brief and will not be reiterated here. Suffice it to say that in spite of the mandate that subsection (5)(h) only applies in the most unusual of cases, the section has become a catch-all circumstance which trial judges are applying in the majority of cases.

A review of some of the cases which interpret subsection (5)(h) will demonstrate how obscure the meaning has become. In Raulerson v. State, 358 So.2d 826 (Fla. 1978), the defendant and an accomplice held up a restaurant at gun-point. While the robbery was still in progress, two officers arrived on the scene, and a shoot-out ensued. One of the officers received

a shot through the chest which had been fired by the defendant. The officer died instantly, but the Court held that the murder was heinous, atrocious and cruel because there were many shots fired, the victim knew that his life was in danger from the moment he entered the restaurant, and it was not a sudden attack, but was part of a general robbery scheme. Id at 834.

In another case with almost identical facts, the Court reversed a finding that subsection (5)(h) existed. In Flemming v. State, 374 So.2d 954 (Fla. 1979), the defendant and an accomplice entered a business establishment to commit an armed robbery. While they were in the building, two officers arrived on the scene. The robbers attempted to escape, taking an employee as a hostage. A shoot-out ensued, and when the officers rushed to the get-away car, one officer was mortally wounded by a shot from the defendant's gun.

It is difficult to imagine two cases which involved more similar fact evidence than Raulerson and Flemming, yet the results regarding subsection (5)(h) are opposite. When two such similar cases reach two such different results, the ordinary man is left without notice of what constitutes an especially heinous, atrocious and cruel capital felony.

Furthermore, the ambiguity cannot be cured merely by overruling or limiting one of these cases. There are many more cases which illustrate the confusion. In Washington v. State, 362 So.2d 658 (1978), the Court upheld a subsection (5)(h) application partly because the evidence showed that after being stabbed, the victim suffered for several minutes before he died. However, in Demps v. State, Case No. 54,249, 6 F.L.W. 76 (Fla. January 8, 1981), the Defendant murdered a fellow inmate by stabbing and although the victim was transferred to three separate hospitals before he died, the Court held that subsection (5)(h) had been erroneously applied.

As stated in Point I, the original definition of heinous, atrocious and cruel required conduct which is "unnecessarily torturous to the victim. It was this aspect of the definition that the United States Supreme Court cited when it found that construction of the section provided adequate guidelines. Proffitt, 428 U.S. at 256. More recent cases, however, have applied the aggravating factor merely because the killing itself was unnecessary. See Hargrave v. State, 366 So.2d 1 (Fla. 1979), and Ford v. State, 374 So.2d 496 (Fla. 1979).

This Court has also stated that "a cold, calculated design to kill constitutes an especially heinous, atrocious or cruel murder." Magill, supra, Alvord v. State, 322 So.2d 533. (Fla. 1975). Since all or most premeditated killings are the result of "a cold, calculated design to kill, these holdings are clearly a broad expansion of the narrow definition which was upheld in Proffitt.

Further supporting the proposition that the meaning of "especially heinous, atrocious and cruel" has become unconstitutionally vague is the fact that in many cases, the Court has not indicated why subsection (5)(h) is or is not applicable. In Holmes v. State, 374 So.2d 944 (Fla. 1979), the trial court failed to explain why it found the murder especially heinous, and the Supreme Court affirmed the judgment without giving its own analysis of the application.

Likewise, in Brown v. State, 381 So.2d 690 (1980), the Court affirmed a finding that the murder was "particularly heinous, atrocious and cruel" without explaining its reason for doing so. Ironically, the Court in Brown made the following observations in affirming the finding that the aggravating circumstance applied:

> "...given the imprecision of the criteria set forth in our capital punishment statute, we must test for reasoned judgment in the sentencing process rather than

mechanical tabulation to arrive at a net sum. Id at 696.

Permitting the trial courts to refuse to explain an aggravating circumstance on the ground that the law is "imprecise" and therefore a "reasoned judgment" is sufficient is tantamount to stating that the law in question is unconstitutional. In Furman v. Georgia, 408 U.S. 238, 33 L.Ed 2d 346, 92 S.Ct. 2726 (1972). Mr. Justice White noted that a capital sentencing scheme must provide a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." Id at 313. Obviously, criteria which is imprecise does not provide a meaningful basis for determining when the death penalty should apply.

For the foregoing reasons, the Appellant respectfully submits that the meaning of the term "especially heinous, atrocious and cruel" has become unconstitutionally vague and overbroad in that it is no longer a matter of common knowledge what that meaning is, and it is being applied to situations which were not contemplated by the original definition which was approved by the United States Supreme Court.

POINT THREE

THE TRIAL COURT ERRED IN FINDING THREE SEPARATE AGGRAVATING CIRCUMSTANCES ALL OF WHICH WERE PROVED BY THE SAME EVIDENCE.

The Trial Court found as three separate aggravating circumstances that:

> One, that three felonies, namely murder in the first degree, involuntary sexual battery, and used or threatned to use in the process thereof a deadly weapon, and robbery in the course thereof carried a firearm were committed by the Defendant.
>
> * * *
>
> Two, the capital felony of murder was committed while the Defendant was engaged in the commission of or the

flight after committing the crime of robbery and rape.

* * *

Four, the said capital felony was committed in connection of the crime of robbery which was perpetrated for pecuniary gain. (RR-14-15).

It is submitted that the same evidence supported all three of these circumstances, and that therefore they are cumulative and in violation of the rulings of this Court.

In Provence v. State, 337 So.2d 783 (Fla. 1976), this Court held that it is improper to find two different aggravating circumstances which refer to the same aspect of the defendant's crime. This concept has been reiterated in many cases since Provence was decided. See Ross v. State, 386 So.2d 1191 (Fla. 1980), and Riley v. State, 366 So.2d 19 (Fla. 1979).

One of the more recent cases in which the rule against "doubling up" was applied is Perry v. State, Case No. 53,003, 6 F.L.W. 18 (Fla. Dec. 18, 1980). In that case, the Court held that aggravating factors may not be considered individually when the same evidence which proves one factor also proves the other. Id at 20.

In the past, this rule has been applied only in cases where a trial court finds that §921.141(5)(e) and §921.141(5)(g) apply. However, there is no logical reason why the same rule should not apply when the trial court finds as two separate aggravating circumstances that the defendant was previously convicted of another felony involving the use or threat of violence §921.141(b) and the capital felony was committed while the defendant was engaged in or flight from the commission of a robbery, rape, etc. (§921.141(e)).

The evidence supporting the trial judge's first finding that the defendant was convicted of three felonies (murder, rape and robbery), and the

evidence supporting the second aggravating factor, that the murder was committed in the commission or flight after committing the crime of robbery and rape, is the same. The acts which constitute committing the murder in the course of a robbery and rape (finding number two) and the acts which caused the defendant to be convicted of the crimes of robbery and rape, are the same.

By employing the logic of Provence, it becomes clear that it is as impermissible to double up on subsections 5(b) and 5(e), as it is to double up on subsections 5(e) and 5(g). As the Court pointed out in Provence, when subsections 5(e) and 5(g) refer to the same aspect of the defendant's crime, anytime a murder is committed in the course of a robbery the defendant will begin with two aggravating circumstances against him. Likewise, when the commission of a rape or robbery refers to the same aspect of the defendant's crime which constitutes a previous conviction of a violent felony, the defendant will always begin with two aggravating circumstances against him. Therefore, the rule in Provence should apply to this type of doubling up as well.

Appellant further submits that the second and fourth findings violate the rule against cumulating aggravating factors. Part of the basis for finding that subsection 5(e) was a factor in this crime was that the murder was committed in the commission or flight after a robbery. Since the evidence that supports that finding is the only evidence that the crime was committed for pecuniary gain, the fourth aggravating factor should be stricken Perry v. State, supra.

For the foregoing reasons, it is submitted that the first and fourth aggravating circumstances were erroneously applied to the defendant's crime and should be stricken.

POINT FOUR

THIS COURT SHOULD VACATE THE SENTENCE OF DEATH AND REMAND THE CASE WITH INSTRUCTIONS TO IMPOSE A SENTENCE OF LIFE IMPRISONMENT.

The trial judge in this case found the existence of three mitigating circumstances. (RR-15). Appellant submits that these three factors outweigh the aggravating circumstances regardless of whether or not the aggravating circumstances were properly applied. Therefore, the sentence of death should be vacated and a sentence of life imprisonment should be imposed.

Appellant is cognizant of the fact that the determination of whether or not the death penalty should be imposed is not based upon a mere tabulation of the aggravating and mitigating circumstances, but requires a weighing of those circumstances. Hargrave v. State, 366 So. 2d 1 (Fla. 1979), Provence v. State, 337 So.2d 783 (Fla. 1976).

However, the mitigating circumstances in this case are very compelling while the aggravating circumstances were either erroneously applied or do not carry a great deal of significance.

The Defendant in this case was a seventeen year old boy who had no significant history of prior criminal activity. (RR-15). Furthermore, the defendant introduced evidence at the resentencing hearing that he was in a state of confusion and emotional instability when the crime took place, due to the recent death of his father (RR-7-9). The trial court found that the father's death was in fact a mitigating circumstance (RR-15). The fact that the crime was committed by a young boy in a state of emotional confusion who showed no gengeral tendency toward criminal activity

should carry great weight on the balancing scale.

On the other side of the scale from these three mitigating factors is the aggravating factor that the capital felony was committed while the defendant was engaged in the commission of a flight after the crime of robbery and rape. (§921.141(5)(e). Although no scientific statistical data is available, Appellant submits that a review of death penalty cases will show that subsection (5)(e) is probably the most frequently applied of any of the aggravating factors found in §921.141(5).

Common knowledge of human behavior tells us that premeditated murders other than crimes of passion will almost always occur during the commission of one of the crimes listed in subsection (5)(e). Therefore, that aggravating circumstance should not be considered so heavy that it outweighs the three mitigating circumstances present in this case.

In Kampff v. State, 371 So.2d 1007 (Fla. 1979), the jury returned a recommendation that the death penalty be imposed, and the trial court complied with the recommendation. This Court vacated the sentence of death and ordered a sentence of life imprisonment, however, because it found that the aggravating circumstances applied by the trial judge had not been sufficiently established, and two mitigating circumstances (which are also present in this case) existed.

Another case which supports Appellant's contention that only a life sentence is appropriate in this case is Tedder v. State, 322 So.2d 908 (Fla 1975). In that case, the trial court found that there were three aggravating circumstances and no mitigating circumstances and imposed the death sentence even though the jury had recommended life. This Court reversed on the death sentence issue although it only found that one of the aggravating circumstances (§921.141(5)(h)) had been misapplied.

Appellant concedes that the jury recommendation in Tedder was a significant factor in the Court's decision. However the fact remains that in that case, the Court vacated a death sentence even though there were two aggravating circumstances and no mitigating circumstances.

For the foregoing reasons, it is submitted that the three mitigating circumstances outweigh the aggravating circumstances and the death sentence should be vacated.

POINT FIVE

IF THE COURT DOES NOT VACATE THE DEATH SENTENCE, THE CASE SHOULD BE RECOMMENDED FOR A COMPLETELY NEW SENTENCING HEARING.

If the Court agrees with even one of the arguments in Points I through III of this Brief, the case should at least be remanded for a new sentencing procedure. In Flemming v. State, 374 So.2d 954 (Fla. 1979), the trial court found one mitigating circumstance and four aggravating circumstances. This Court remanded the case for resentencing because the finding that the murder was heinous, atrocious and cruel was erroneous. The Court stated that "Since we are unable to determine what significance this factor was given in the weighing process, we must reverse and remand..."

Similarly, in this case, we are unable to determine what weight the trial judge placed on the aggravating factors or the mititgating factors. Therefore, unless this Court vacates the sentence of death, the cause should be remanded for resentencing.

CONCLUSION

For the foregoing reasons the appellant submits that the decision of the trial court imposing the death sentence should be reversed.

Respectfully submitted,

PHILIP J. PADOVANO
Post Office Box 873
Tallahassee, Florida 32302
(904) 224-3636

and

MARY M. PICCARD
Post Office Box 873
Tallahassee, Florida 32302
(904) 224-3636

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to the Hon. Jim Smith, Attention: Barbara Butler, Assistant Attorney General, 232 Third Avenue, Second Floor, Daytona Beach, Florida 32014 this 17 day of June, 1981.

PHILIP J. PADOVANO

CONCLUSION

For the foregoing reasons the appellant submits that the decision of the trial court imposing the death sentence should be reversed.

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PHILIP J. PADOVANO

IN THE SUPREME COURT OF FLORIDA

PAUL EDWARD MAGILL,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NO. 51,699

ANSWER BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

BARBARA ANN BUTLER
ASSISTANT ATTORNEY GENERAL

125 No. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR APPELLEE

TOPICAL INDEX

Page

PRELIMINARY STATEMENT.....1-2

STATEMENT OF THE CASE.....3

STATEMENT OF THE FACTS.....4-7

POINTS ON APPEAL:

I. THE TRIAL COURT DID NOT ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE INSTANT MURDER WAS HEINOUS, ATROCIOUS AND CRUEL.....8-16

II. THE TERM "HEINOUS, ATROCIOUS, AND CRUEL" IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED.....17-22

III. THE TRIAL COURT'S ACTION IN FINDING THREE SEPARATE AGGRAVATING CIRCUMSTANCES WAS PROPER.....23-26

IV. APPELLANT'S SENTENCE OF DEATH IS PROPERLY IMPOSED AND SHOULD NOT BE VACATED.....27-31

V. A NEW SENTENCE HEARING IN THE INSTANT CAUSE IS NOT REQUIRED.....32

CONCLUSION.....33

CERTIFICATE OF SERVICE.....33

AUTHORITIES CITED

CASES — Page

Aldridge v. State,
351 So.2d 942 (Fla. 1977) 31

Alvord v. State,
322 So.2d 533 (Fla. 1975) 14,16

Cooper v. State,
336 So.2d 1133 (Fla. 1976) 15

Demps v. State,
395 So.2d 501 (Fla. 1981),
rehearing denied 20

Dougan v. State,
Case No. 47,260 (Fla. April 9, 1981)
[1981 F.L.W. 272] 10,11

Fleming v. State,
374 So.2d 954 (Fla. 1979) 18,19

Ford v. State,
251 So.2d 562 (Fla. 3d DCA 1971) 14

Funchess v. State,
Case No. 47,828 (Fla. April 2, 1981)
[1981 F.L.W. 251] 10

Gardner v. Florida,
430 U.S. 349 (1977) 10,11

Gibson v. State,
351 So.2d 948 (Fla. 1977) 14

Godfrey v. Georgia,
100 S.Ct. 1759 (1980) 21

Hargrave v. State,
366 So.2d 1 (Fla. 1978) 27

Jackson v. State,
366 So.2d 752 (Fla. 1978) 31

AUTHORITIES CONT.

CASES — Page

Knight v. State,
338 So.2d 201 (Fla. 1976) 14

Lucas v. State,
376 So.2d 1149 (Fla. 1979) 14,27

Magill v. State,
386 So.2d 1188 (Fla. 1980),
revised on denial of rehearing (September 8, 1980) 3,4,9,11, 12,16,27,28

Meeks v. State,
339 So.2d 186 (Fla. 1976) 16,18

Menendez v. State,
368 So.2d 1278 (Fla. 1979) 15

Perry v. State,
395 So.2d 170 (Fla. 1980) 25

Proffitt v. Florida,
428 U.S. 242 (1976) 17,21

Provence v. State,
337 So.2d 783 (Fla. 1976) 24,25

Raulerson v. State,
358 So.2d 826 (Fla. 1978) 18,19

Ruffin v. State,
Nos. 55,684 & 56,741
(Fla. March 26, 1981)[1981 F.L.W. 228] 15,16

Songer v. State,
365 So.2d 696 (Fla. 1978)
rehearing denied 10
cert. denied, 441 U.S. 956 (1979) 11

State v. Dixon,
283 So.2d 1 (Fla. 1978) 8,9,16 21,31

AUTHORITIES CONT.

CASES

Sullivan v. State,
303 So.2d 632 (Fla. 1974) 16

Washington v. State,
362 So.2d 658 (Fla. 1978) 20

Wilson v. State,
208 So.2d 479 (Fla. 3d DCA 1968) 14

OTHER AUTHORITIES

Florida Statutes

§921.141 9,11,30
§921.141(5)(h) 8,11,12,17
§921.141(5)(d) 8,11,23,24
§921.141(5)(f) 9,11,23,25
§921.141(6)(g) 10,27
§921.141(6)(a) 10,28

IN THE SUPREME COURT OF FLORIDA

PAUL EDWARD MAGILL,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Appellant was the defendant and Appellee the prosecution in the Circuit Court of the Fifth Judicial Circuit, in and for Marion County, Florida. In this brief the parties will be referred to as they appear in Appellant's initial brief.

The Record on Appeal consists of four (4) separately bound transcript volumes of the bifurcated jury trial held on March 21-22, 1977 before the Honorable W.T. Swigert, Circuit Judge and the official trial court record. The transcript is numbered sequentially and will be referred to by the symbol "T" followed by the appropriate page number(s). The record proper will be referred to by the symbol "R" followed by the appropriate page number(s). The transcript of the resentencing held on January 26, 1981 before Judge Swigert will be referred to by the sumbol "S" followed by the appropriate page number(s). The supplemental record of the resentencing which consists of the judgment and sentence and sepa-

findings of facts, both entered on January 26, 1981 will be referred to by the symbol "SR" followed by the appropriate page number(s).

STATEMENT OF THE CASE

Appellee hereby accepts Appellant's Statement of the Case with the following exception. This Court's affirmance of Appellant's conviction and remand for resentencing is reported as Magill v. State, 386 So.2d 1188 (Fla. 1980) as revised on denial of rehearing (September 8, 1980).

STATEMENT OF THE FACTS

Appellant has adopted the Statement of Facts as set forth in his original direct appeal initial brief. This statement of the facts consists of an overly-exhaustive thirty-page narrative of trial testimony. Such a recitation of the facts is unnecessary in light of the scope of this review. Therefore Appellee would offer the following concise restatement of facts as gleaned from this Court's opinion in Magill v. State, 386 So.2d 1188 (Fla. 1980) as revised on denial of rehearing (September 8, 1980):

> The defendant, Magill, seventeen years of age at the time, robbed a small store, abducted the female attendant, raped her, and then killed her.
>
> . . .
>
> The record clearly shows that the defendant first robbed the victim and kidnapped her while in the process of fleeing the site of the robbery. He then took the victim to a wooded area and raped her. As they were returning to the car after the rape, the victim begged that she not be injured. Defendant realized that she would be able to identify him, so he shot her three (3) times, 'twice in the head and once in

> the chest'. Defendant reaffirmed the details of a confession while on the stand at trial, although he attempted to recant the portion of his testimony where he stated that he had killed the victim to avoid identification. The jury obviously believed the confession and not the recantation. . . .the record shows that the victim was shot in the head and fell to the ground, after which the defendant deliberately shot her twice more, once in the head and once in the chest. The chest shot was at such close range that it left powder burns. The record is clear that the defendant had a cold, calculated design to effect the death of the helpless victim. This is evident from the number of times the defendant shot the victim with his .44 caliber pistol, the approximity of the muzzle of the pistol to the victim's chest, and the defendant's statement to the police that he shot her to avoid identification and make sure that she was dead.

Id. at 1189, 1190-1191.

Additionally Appellee would add that there were three eyewitnesses to the robbery and/or abduction: young Danny Hall who entered the store during the robbery and was told to leave by Appellant, did so, but watched from a nearby hill and saw Appellant and the victim leave in a Mustang (T-254-266); Ann Denene and Chalmer Rupp, customers who arrived as Appellant and the girl were leaving the parking lot in the Mustang (T-304, 307-309). Appellant was apprehended by police officers as he exited a nearby dirt road driving the Mustang. (T-292-294) A chase ensued in which Appellant's Mustang was forced from the highway into a ditch. (T-294) Appellant then ran from the vehicle. (T-295)

Appellant at first stated that he did not know why he had been stopped. (T-317) However upon being advised that his vehicle matched the description of a vehicle involved in a robbery and abduction, Appellant began to cry. He stated that he had robbed, raped and killed her. (T-318) The officer asked to be taken to the girl as she might not be dead. (Id.) Appellant replied that he was sure that she was dead. He had taken care of it. (Id.)

Following Appellant's directions, the officer found the body of the young victim in a secluded wooded area about seven-tenths of a mile down the dirt road. (T-318-319)

At the January 26, 1981 resentencing hearing, Appellant offered in mitigation restatements of the testimony adduced at the earlier sentencing phase of Appellant's bifurcated trial. Information was supplied concerning Appellant's prior delinquency, the "turmoil" which resulted from the death of Appellant's father,

slightly over one (1) year before the instant murder and various efforts to obtain counseling for Appellant. (S-3-7) Appellant's mother testified at the resentencing hearing. (S-3-4) Appellee, the State of Florida, presented no testimony or evidence at the resentencing.

POINT I

THE TRIAL COURT DID NOT ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE INSTANT MURDER WAS HEINOUS, ATROCIOUS AND CRUEL.

ARGUMENT

Appellant has correctly stated that the term heinous, atrocious and cruel was defined by this Court in State v. Dixon, 283 So.2d 1 (Fla. 1978). Appellant is also correct when asserting that this definition has been frequently restated and is the current standard utilized in arriving at the aggravating circumstance codified in Florida Statute, §921.141(5)(h). However this standard and its application to the instant set of facts is not presently before this Court.

As previously stated, the instant cause was remanded to the trial court by this Honorable Court for resentencing. At the original imposition of the capital death sentence, the trial court found the following aggravating circumstances:

> (2) The capital felony of Murder was committed while the Defendant was engaged in the commission of, or flight after committing, the crime of Robbery and Rape. [Fla.Stat. §921.141(5)(d)]
>
> (3) The said capital felony was especially heinous, atrocious and cruel, as there existed no logical compelling reason for the defendant to kill said robbery and rape victim and same was the heinous act of a person evincing a depraved criminal mind. [Fla.Stat. §921.141(5)(h)]
>
> (4) The said capital felony was committed in connection with the crime of robbery

> which was perpetrated for pecuniary gain. [Fla.Stat. §921.141(5)(f)]
>
> (5) The court finds no mitigating circumstances which outweigh the aforementioned aggravating circumstances.

(R-79) These findings were contained in written form in the trial court's finding of fact entered April 25, 1977. (Id.) The inclusion of category five (5), supra, necessitated remand in the instant cause -- not the finding of erroneous aggravating factors. This Court stated:

> It is apparent that the trial judge used a reasoned judgment and, in the absence of sufficient mitigating circumstances, the death penalty was justified. The Court found that there were 'no mitigating circumstances which outweigh the aforementioned aggravating circumstances.' [Quoting from the aforementioned category (5) of the trial court's Finding of Fact] However, the Court did not specifically list the mitigating circumstances which he may or may not have considered. Even though the trial judge may have considered some mitigating circumstances, he is charged with the further responsibility of articulating them, so as to provide this Court with the opportunity of giving a meaningful review of the sentence of death.

(Id.) Magill, supra at 1191. The opinion then referred to Fla. Stat. §921.141 which requires the trial judge to justify the sentence of death in writing. Id. See also State v. Dixon, supra at 8.

The remand in the instant cause was for the express purpose of making proper findings of fact concerning the mitigating factors considered, if any, and then, imposing an appropriate sentence. The trial court's actions are consistent with this Court's directive.

At the January 26, 1981 resentencing, the trial court verbally announced the finding of fact and thereby concluded that the advisory sentence of the jury should be followed. Thereupon the trial court reimpose the sentence of death upon Appellant.

The aggravating circumstances announced at the resentencing, and included in the second finding of fact, are identical to those found at the time of the initial sentencing. (R-79, S-3-4) However, in addition, the trial court has enumerated the mitigating circumstances considered in arriving at the decision to reimpose the death sentence. As mitigating circumstances, the trial court has found:

> (a) That Appellant was seventeen years of age at the time of the offense charged. [Fla.Stat. §921.141 (6)(g)];
>
> (b) that Appellant lacked a significant prior criminal record. [Fla.Stat. §921.141(6)(a)];
>
> (c) that Appellant's father passed away on December 28, 1975. [This is a non-statutory mitigating factor].

(SR-3) The trial court further found Appellant had failed to establish by evidence the existence of any other mitigating circumstances. (Id.) Likewise, no attempt was made by Appellant on remand to challenge the aggravating factors. (S-2-16)

The remand in the instant cause is similar to remands pursuant to Gardner v. Florida, 430 U.S. 349 (1977) wherein information is considered by the trial court unbeknownst to a defendant and is, therefore, unrebutted. See Songer v. State, 365 So. 2d 696 (Fla. 1978) rehearing denied; Funchess v. State, Case No. 47,828 (Fla. April 2, 1981)[1981 F.L.W. 251] and Dougan v. State,

Case No. 47,260 (Fla. April 9, 1981)[1981 F.L.W. 272]. Like Gardner remands the remand in the instant casue was not for the purpose of an entirely new sentencing proceeding. This would have necessitated the convening of a new advisory jury for the penalty phase of a bifurcated trial. Songer v. State, 365 So.2d 696 (Fla. 1978) cert. denied, 441 U.S. 956 (1979). This Court's opinion clearly found no need to empanel another jury. Magill, supra at 1191.

In a Gardner remand, the only appropriate question is the rebuttal of the undisclosed information. Here, the only proper question before this Court is whether Appellant's newly imposed sentence of death is proper under the previously found aggravating circumstance and the newly enumerated mitigating circumstances. The aggravating circumstances found at the resentencing are identical to those found at the initial sentencing. (R-79, SR-3) In Magill, supra, this Court did not find fault with the trial court's finding of aggravating circumstances pursuant to Fla.Stat. §921.141(5)(d), (h) and (f). c.f. Dougan v State, supra at 273, J. McDonald dissenting. (reference to unfounded and improper aggravating factors). The inclusion of the instant aggravating circumstances was fully reviewed and argued in Appellant's initial brief. (See Appellant's original initial brief, pp. 87-96) This Court found no fault with the "reasoned judgment" of the trial court regarding the aggravating circumstances found. Indeed, this Court specifically upheld the finding of the heinous, atrocious and cruel as an aggravating factor. The weighing process of this Court's initial review, pursuant to Fla.Stat. §921.141, was precluded only

by the trial court's failure to enumerate the existing mitigating circumstances, if any. Magill, supra at 1191.

Appellee submits that the aggravating circumstances found at the initial sentencing, and restated by the trial court at the January 26, 1981 resentencing, have become the law of the instant case. The validity of the trial court's findings regarding the aggravating circumstances is not at issue. Rather these aggravating circumstances are to be reviewed and weighed against the newly enumerated mitigating circumstances in assessing the propriety of the reimposed capital sentence. Therefore, Appellee respectfully submits that Appellant's Point I is untimely and repetitious and should not be considered by this Honorable Court.

Assuming arguendo that this Court should deign Appellant's argument under Point I as proper, Appellee would offer the following argument on the merits.

Appellant argues that the instant murder was an "ordinary killing" and, although perhaps appalling, the facts do not warrant a classification as heinous, atrocious and cruel pursuant to Fla.Stat. §921.141(5)(h). We disagree and submit that the aggravating circumstance found by the trial court is amply supported by the record on appeal.

The record clearly shows that Appellant confessed that he was returning to his car with Karen Sue Young after raping her. Miss Young was begging for her life whereupon Appellant realized that she had seen him and would be able to identify him when questioned. Accordingly, Appellant shot her three (3) times, twice in the head and once in the chest. (T-352) The tape recording of

Appellant's confession was introduced at trial and played for the members of the jury. This confession, in pertinent part, reveals the following:

THE WITNESS: We were walking up towards the car and she was pleading with me not to hurt her and I realized that she had seen me and that she would be able to identify me when questioned and I shot her three times, twice in the head and once in the chest.

MR. KING: What did you use to shoot her?

THE WITNESS: It was a forty-four special.

MR. KING: You shot her twice in the head and once in the chest?

THE WITNESS: Yes.

MR. KING: Okay. When you shot her, what did she do?

THE WITNESS: She had kind of grunted a little when I shot her and fell to the ground.

MR. KING: When you shot her in the head, did you do it simultaneously, bang, bang?

THE WITNESS: No.

MR. KING: Okay. You shot her once. Let's look at the first shot. You shot her once with the first.

THE WITNESS: Yeah.

MR. KING: What did she do then?

THE WITNESS: She gave a little grunt and fell to the ground.

MR. KING: Okay. Did you shoot her a second time on the ground?

THE WITNESS: Yes.

MR. KING: In the head?

THE WITNESS: Once in the head, yeah.

MR. KING: Okay, and then you shot her a third time while she was on the ground?

THE WITNESS: Yes.

MR. KING: Okay. That means you shot her once while she was standing up, shot her in the head; is this correct?

THE WITNESS: Yes.

MR. KING: And then you shot her twice more while she was on the ground?

THE WITNESS: Yes.

MR. KING: Okay. After you shot her three times, she's laying on the ground. What did you do with her body?

THE WITNESS: I tried to drag it out into the bushes.

(T-352-354) Appellant reaffirmed the details of his confession during his trial testimony. (T-420) He attempted to recant the portion of the confession wherein he stated that he killed Miss Young to avoid identification. (T-432-433) It is obvious that the jury believed the confession rather than the recantation. Such action is well within the province of the jury. Ford v. State, 251 So.2d 562 (Fla. 3d DCA 1971); Wilson v. State, 208 So.2d 479 (Fla. 3d DCA 1968); Alvord v. State, 322 So.2d 533 (Fla. 1975).

Thus the record is exceedingly clear that the victim begged that she not be injured. c.f. Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979); Gibson v. State, 351 So.2d 948, 949 (Fla. 1977); Knight v. State, 338 So.2d 201, 202 (Fla. 1976). Addi-

tionally, the record reflects that the young victim suffered physical injury preceeding her death in that she was abducted and raped by Appellant. Unlike Menendez v. State, 368 So.2d 1278 (Fla. 1979) and Cooper v. State, 336 So.2d 1133 (Fla. 1976), we do not know what events preceeded the instant killing which could have revealed Appellant's intent and motive and/or the young girl's cognition of impending death and, consequently, her fear and distress.

The record shows that the victim was first shot in the head and fell to the ground, after which Appellant deliberately attempted to shoot her twice more once in the head and once in the chest. The chest shot was at such close range that powder burns were deposited upon the girl's chest. (T-352-354, 407-408) Since expert testimony revealed that only two bullets entered the victim's body, one in the head and one in the chest, it is apparent that Appellant missed his second gunshot to the victim's head. (T-379) We submit that it is evident from the number of times Appellant shot or attempted to shoot his victim with the .44 caliber pistol, the proximity of the muzzle of the pistol to the young girl's chest, Appellant's statements to the police officer that he shot his victim to avoid identification, and Appellant's certainty of the girl's death, that Appellant made a cold, calculated decision to effect the death of his raped and helpless victim. (T-352, 318)

This Court has oft-times recognized that a cold, calculated design to kill constitutes an especially heinous, atrocious or cruel murder. Ruffin v. State, Nos. 55,684 and 56,741 (Fla.

March 26, 1981)[1981 F.L.W. 228], Alvord v. State, supra; Sullivan v. State, 303 So.2d 632, 637 (Fla. 1974); and Meeks v. State, 339 So.2d 186 (Fla. 1976). We would point out, as did this Court in its earlier opinion, that Meeks v. State, supra, is factually similar to the instant cause. Magill at 1191. The only factual difference between Meeks and the instant cause is that Meeks did not rape his victims before murdering them. The death penalty was properly awarded in Meeks and, we submit, a capital sentence is equally appropriate under the instant facts.

The jury was properly instructed as to the meaning of heinous, atrocious, and cruel pursuant to State v. Dixon, supra. (T-606) The jury then entered an advisory sentencing recommendation of death. (T-612)

It is Appellee's position that Appellant's crimes of robbery, rape and murder reflect a consciousness materially more outrageously wicked and vile than that of an "ordinary" murder. Therefore, we submit that the finding of the instant murder as heinous, atrocious and cruel is proper and urge this Court, upon review, to affirm the finding of this aggravating factor.

POINT II

THE TERM "HEINOUS, ATROCIOUS, AND CRUEL" IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED.

ARGUMENT

Appellant argues that the definition of heinous, atrocious and cruel, as it existed at the time of Proffitt v. Florida, 428 U.S. 242 (1976), has become so unconstitutionally vague and overbroad that it is nothing more than a catch-all circumstance utilized in the majority of capital cases. Appellant supports this premise with a review of case law which purportedly interprets §921.141(5)(h). Appellant then concludes that the aggravating factor no longer has a meaning of common knowledge and is being applied to situations which were not contemplated by the original definition when approved by the United States Supreme Court in Proffitt v. Florida.

Firstly, Appellee submits that the instant argument is not properly before this Court for review for the same rationale as advanced under Point I. (See Argument under Point I, pp. 8-12) Appellee respectfully submits that the instant argument is far beyond the scope of the instant review. The instant challenge was not raised initially in brief. The aggravating factor has been affirmed by this Court and cannot be revisited at this time.

Secondly, Appellant's review of a small number of cases, which purportedly reach untoward results in allegedly similar factual situations, is insufficient to exemplify the alleged obscured meaning

of the statutory provision. Indeed, the finding of the aggravating circumstance in the instant cause coupled with an identical finding in the factually analogous case of Meeks v. State undermines this argument. Precisely for this reason, Appellee urges the affirmance of the aggravating factor of heinous, atrocious and cruel in the instant circumstances as was done in Meeks.

Moreover, a close scrutiny of the cases cited by Appellant fails to reveal the alleged discrepancies. Raulerson v. State, 358 So.2d 826 (Fla. 1978) and Fleming v. State, 374 So.2d 954 (Fla. 1979) are perhaps superficially similar. However, a close examination of the facts provides ample justification for the finding of heinous, atrocious and cruel in Raulerson, supra, and the absence of such a finding in Fleming, supra.

In Raulerson, the defendant and a cousin, entered the back door of a restaurant after closing and forced the employees to lie face down on the floor. Defendant Raulerson took a young employee into a back room where he forced her to commit fellatio and then raped her. The cousin was standing watch over the employees and was shot by a police officer responding to the scene. As the police officer bent over the cousin, Raulerson appeared and shot the officer. Despite the officer's cry that he was injured, Raulerson continued to fire five (5) more times until he emptied his revolver. A second police officer was shot in the heart and killed. Finding no viable escape, Raulerson eventually surrendered. In finding the aggravating factor of heinous, atrocious and cruel, the trial court concluded that the murder, robbery and rape had been committed in a cold, calculated manner. On appeal,

Raulerson argued that a murder accomplished by a pistol shot which caused immediate death could not be heinous, atrocious and cruel. In affirming the aggravating factor, this Court emphasized that the crime was committed during the course of a burglary and especially emphasized the rape. Also stressed was the decedent's apprehension and awareness of danger from the moment he entered the restaurant. Additionally this Court specifically found that the death did not result from a sudden attack. Id. at 834.

In Fleming, supra, armed defendants entered an office building with the intent to commit robbery. The defendants overtook an employee forcing him to open the company's safe. A second employee observed activity and notified the police. Shortly thereafter, patrol cars arrived and the defendants, utilizing the employee as a hostage, attempted to run. A gun battle ensued in which several police officers were injured. The hostage grabbed the guns of both his captors as police officers rushed the vehicle. During the struggle Fleming's gun discharged striking and killing a police officer. On appeal he argued that the killing of the police officer was no more shocking than the majority of the murder cases reviewed. This Court agreed but specifically emphasized that the murder was committed by a single shot fired when the hostage grabbed appellant's gun.

Appellee submits that the factual circumstances of Fleming and Raulerson differ greatly. Thus when viewed in their entirety, there is sufficient justification for the finding of the aggravating factor in one case, but not in the other. Additionally, we would submit that Appellant's summarization of factual similarity

between Washington v. State, 362 So.2d 658 (Fla. 1978) and Demps v. State, 395 So.2d 501 (Fla. 1981), rehearing denied, is equally without merit.

Appellant argues that in Washington, supra, the finding of heinous, atrocious and cruel was supported, admittedly in part, by evidence showing that the victim suffered for several minutes before he died. This fact was certainly considered by the trial court and by this Court. However, Washington was appealing three (3) separate first degree murder convictions, each arising from a separate incident. The facts are amply reported in the decision which offers clearer evidence of a cold, calculated design to kill than alluded to in Appellant's "several-minute-lingering-death" argument.

In Demps, evidence was presented that a prison inmate was stabbed to death in his cell by another inmate as a third inmate held the decedent. The factual recitation is brief. However, it is clear that the decedent was transferred to two (2) prison hospitals for treatment prior to being taken to Shands Teaching Hospital in Gainesville where he died soon after arrival. Admittedly, the "lingering", focused upon by Appellant, was more lengthy than in Washington. However under the factual circumstances the time element was perhaps avoidable or attributable to intervening factors. Although the aggravating circumstances was stricken in Demps, the death penalty was upheld for both inmates.

Appellant argues that all or most premeditated killings are the result of a cold calculated design to kill. Therefore, he

continues, the finding of heinous, atrocious and cruel premised upon a cold calculated design to kill is an expansion of the narrow definition of Fla.Stat. §921.141(5)(h) as upheld in Proffitt. We respectfully disagree. The factual circumstances offered in support of this particular aggravating factor must be individually considered and weighed. It would be impossible to compile a standardized test whereby facts, seemingly similar, are plugged into a mathematical compulation. Just as the relevant mitigating and aggravating circumstances must be weighed by the trial court and by this Court in deciding whether a sentence of life imprisonment or death is proper, the individual circumstances of a case must be weighed to determine whether heinous, atrocious and cruel is appropriately applied. The overall weighing process of an appropriate sentence is not satisfied merely because the aggravating circumstances out-number the mitigating circumstances. State v. Dixon, supra. Likewise, the factors in aggravation and mitigation must be individually considered and weighed. Cases may appear inapposite when viewed superficially, however, when given indepth analysis during the briefing and arguing stages of appellate review, individual justifications and distinctions routinely emerge. Appellee submits that an objective review of the case law cited by Appellant fails to support his position.

Appellant places great stress upon cases decided subsequent to the United States Supreme Court review of the Florida capital statute in Proffitt v. Florida, supra. In conclusion, we would respectfully direct this Court's attention to the recent case of Godfrey v. Georgia, 100 S.Ct. 1759 (1980) wherein the

United States Supreme Court reversed a death sentence based on the Georgia statute. The United States Supreme Court cited Proffitt v. Florida, supra, as a valid example of a capital sentencing scheme which provides "specific and detailed guidance." Id. at 1764-1765. Appellee submits that this is additional affirmation by the United States Supreme Court that the Florida capital sentencing statute, including the provision challenged herein, is not unconstitutional nor has it been applied in a vague or inconsistent manner.

POINT III

THE TRIAL COURT'S ACTION IN FINDING THREE SEPARATE AGGRAVATING CIRCUMSTANCES WAS PROPER.

ARGUMENT

Appellant charges that three separate aggravating circumstances are supported by the same evidence and, therefore, are cumulative. Appellee submits that these aggravating circumstances were previously affirmed by this Court. Therefore, the factors are not subject to challenge at this juncture. (See argument contained under Point I, supra, pp. 8-12)

Assuming arguendo, that this Court will address the argument on its merit, Appellee would state as follows:

The Finding of Fact entered by the trial court at the conclusion of the resentencing hearing contains the following aggravating circumstances:

> (2) The capital felony of Murder was committed while the Defendant was engaged in the commission of, or flight after committing, the crime of Robbery and Rape. [Fla.Stat. §921.141(5)(d)]
>
> (3) The said capital felony was especially heinous, atrocious and cruel, as there existed no logical compelling reason for the Defendant to kill said robbery and rape victim and same was the heinous act of a person evincing a depraved criminal mind. [Fla.Stat. §921.141(5)(h)]
>
> (4) The said capital felony was committed in connection with the crime of robbery which was perpetrated for pecuniary gain. [Fla.Stat. §921.141(5)(f)]

(SR-5)

The uncontraverted record in the instant cause shows that Appellant first robbed Karen Sue Young, then kidnapped her in the process of fleeing the site of the robbery; he raped her during her abduction, and then murdered her while fleeing the site of the rape. Only one (1) aspect of Appellant's criminal action, the robbery, was for pecuniary gain. In Provence v. State, 337 So.2d 783 (Fla. 1976), this Court held that a robbery is always committed for pecuniary gain. Therefore, the trial court properly found that the murder of the store's cashier was for pecuniary gain. We submit that Fla.Stat. §921.141(5)(f) is unquestionably applicable under the rule announced in Provence, supra.

A separate aspect of Appellant's criminal act was the rape of Karen Sue Young. The murder occurred immediately after the rape at a time when the appellant and his helpless victim were on their way back to the Mustang, presumably in order to flee the scene of the rape. Thus it is clear that Appellant murdered his victim during the commission of, or flight after, the commission of the rape. Therefore we submit that Fla.Stat. §921.141(5)(d) is applicable.

It is of no moment that Appellant's flight after the commission of the rape was a part of, or subsequent to, his flight from the commission of the robbery. The crimes are separate and distinct. If Appellant had not committed the rape, it is unlikely he would have had to flee from the secluded wooded area approach-

able by means of a country dirt road. This flight was clearly separate from his flight from the scene of the robbery. Inasmuch as both robbery and rape are enumerated in §921.141(5)(d), and Appellant committed both crimes, this section may be applied doubly without violating Provence wherein only a robbery was involved.

Thus the circumstances are vastly different than those found in Perry v. State, 395 So.2d 170 (Fla. 1980) wherein the trial court found as aggravating factors both the underlying felony of robbery and the commission of murder for pecuniary gain. In Perry, the supporting evidence for each factor was identical. This is not the situation with the instant set of facts. Therefore, Appellee submits that Perry is inapplicable.

The rape in the instant cause did not involve pecuniary gain and §921.141(5)(f) is not applicable with "flight". Thus the application of subsections (d) and (f) under the specific factual circumstances of this case is proper. We submit that the trial court did not err in concluding that both aggravating circumstances were applicable. Provence, supra, is distinguishable in that only murder and robbery occurred. In the instant cause, robbery, rape and murder were committed by Appellant. Indeed Provence specifically addressed this concept. The Court stated:

> While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) refer to separate analytical concepts and can validly be considered to constitute two circumstances....

Id. at 786. Consequently, Appellee submits that the "doubling

rationale" urged by Appellant is proper under the factual situation that is found in the present case.

Appellee respectfully submits that the trial court's finding of aggravating circumstances pursuant to subsections (d), (h), and (f), are proper and are sufficiently supported by the record in the instant cause. We urge this Court to affirm each of the aforementioned aggravating factors.

POINT IV

APPELLANT'S SENTENCE OF DEATH IS PROPERLY IMPOSED AND SHOULD NOT BE VACATED.

ARGUMENT

Appellee submits that the statutory provision of §921.141(5) has been complied with fully. There is no abuse as alleged by Appellant. Appellant's sentence of death is based upon sufficient and proper aggravating factors.

As stated, the instant cause was remanded for resentencing due to the failure of the trial court initially to specify which, if any, mitigating circumstances were considered. (R-79) Magill at 1191. Therefore upon resentencing, the trial court specifically listed the mitigating circumstances which were considered, but which failed to outweigh the aforementioned aggravating circumstances. (SR-3-5) The mitigating circumstances found at resentencing have been previously stated, but are as follows:

(a) Appellant's age. Fla.Stat. §921.141(6)(g)

The evidence presented to the trial court and to the jury showed that Paul Edward Magill was seventeen (17) years of age at the time of the December 23, 1976 murder, robbery and rape. The trial court is not compelled to make a finding of age in mitigation. Hargrave v. State, 366 So.2d 1 (Fla. 1978); Lucas v. State, 376 So.2d 1149 (Fla. 1979). However, the trial court did take notice and considered this factor in the weighing process prior to imposition of sentence. Although Appellant's age was

considered at resentencing, the trial court concluded, as had the jury, that a sentence of death was warranted under the instant facts.

(b) Appellant lacked a significant prior criminal record. Fla.Stat. §921.141(6)(a).

At the January 26, 1981 resentencing, the defense argued that Appellant had no significant history of prior criminal activity. The trial court agreed with the assertion and the State Attorney entered a non-objection. (S-7) Thereupon, the trial court entered the finding as a mitigating factor. (SR-4-6, S-7-15)

Appellee directs the attention of this Court to the precise finding: that Appellant did not have a significant history of prior criminal activity. This is not an indication that Appellant lacked a criminal history. Indeed, his mother testified that she had increased difficulties with her son during the year immediately preceeding the murder. These difficulties included delinquency, absences and complaints from the school. The record is unclear as to whether these complaints were for occurrences other than "skipping". (S-4) Additionally, Appellant was "taking things" presumably in order to get money to get away from home and his mother. (Id.) Appellant's counsel alluded to shoplifting charges from Sears and Fields. (S-5) It is also a known fact that at the time of the instant offenses Appellant was on probation. Importantly, the mother testified that her son had prior involvement with law enforcement authorities dating back to the age of thirteen (13) years. (S-6)

(c) Appellant's father passed away on December 28, 1975. [Non statutory mitigating factor].

Appellant attempted to convince the trial court that his alleged mental or emotional disturbance prior to the instant offenses was a proper mitigating factor under Fla.Stat. §921.141 (6)(b). The trial court declined to enter such a finding based upon the testimony and argument at the resentencing as well as the lengthy testimony presented at the original penalty hearing. Instead, the trial court found as an influential factor, the non-statutory mitigating circumstance of the death of Appellant's father. Appellant's mother testified that Appellant's father died on December 28, 1975. (S-9) The instant murder, rape and robbery took place on December 23, 1976. Appellant's mother stated that in the year following her husband's death, her ability to control and communicate with Appellant decreased. Somewhat contradictorly, the mother also testified that Appellant's period of "adolescent turmoil" began at the age of thirteen (13). The testimony indicated that the "turmoil" became more intense following the father's death. (S-6-7) Thus it would appear that the death of the father was not the direct causation of any "problem" which may have existed.

Appellee submits that the trial court's failure to find the mitigating factor codified in subsection 6(b), i.e. the existence of extreme mental or emotional disturbance, flies in the face of Appellant's argument under this section. Appellant would have this Court believe that a young boy, without significant history of criminal activity, committed the robbery, rape and murder of a young woman out of a sense of confusion and emotional insta-

bility arising from the recent death of his father. The factual record of the instant cause clearly shows that the trial court rejected this "emotional-instability-confusion" argument at the time of the initial sentence and again at the resentencing hearing four (4) years later. Appellee submits that the finding of the non-statutory mitigating factor carried little weight in the trial court's balancing of the aggravating and mitigating circumstances of the instant cause. The finding is little more than an acknowledgement of the death of Appellant's father slightly more than one year preceding the murder. It is not a finding of instability, mental duress and disturbance as repeatedly argued by Appellant. Appellee urges this Court to give the fact little or no weight in its evaluation as the factor is improper.

(d) Balancing of Aggravating and Mitigating Circumstances.

Upon careful consideration of the evidence presented, both at trial and at the penalty phase, the jury returned an advisory recommendation that the sentence of death be imposed. (T-61, 12) Accordingly, and in full compliance with Fla.Stat. §921.141, the trial court then weighed the aggravating and mitigating factors involved and sentenced Appellant to death for the offense of murder. At the January 26, 1981 resentencing, the trial court again balanced the aggravating and newly enumerating mitigating factors and reimposed a sentence of death upon Appellant. The trial court specifically found that the enumerated mitigating circumstances were insufficient to outweigh the aggravating circumstances found. (SR-4)

Appellee respectfully submits that where the aggravating circumstances outweigh the mitigating circumstances, the imposition of a death sentence is proper. Aldridge v. State, 351 So.2d 942 (Fla. 1977) Moreover, where as here, the trial court follows the sentencing recommendation of the jury and the evidence clearly supports the finding of aggravating circumstances which outweigh the mitigating curcumstances, this Court should not substitute its own judgment for that of the trial court. Jackson v. State, 366 So.2d 752 (Fla. 1978)

Based on the foregoing, Appellee submits that all relevant and required mitigating and aggravating circumstances were considered by the trial court. As noted in State v. Dixon, supra, the weighing process is not satisfied merely because the aggravating circumstances outnumber the mitigating circumstances. The factors in aggravation and mitigation must be individually considered and weighed. We respectfully submit that this has been done in the instant cause. Furthermore, in the instant cause there is ample evidence of the severity of the offense which when weighed against the aforementioned mitigating factors provides ample justification for imposition of a death sentence. Notwithstanding Appellant's impassioned plea in brief, the conviction and sentence in the instant cause is adequately supported by both fact and law. Therefore, we urge this Court to affirm the sentence of death in the instant cause.

POINT V

A NEW SENTENCE HEARING IN THE INSTANT CAUSE IS NOT REQUIRED.

ARGUMENT

Appellant's argument under this point is premised upon a finding by this Court that one of the arguments raised pursuant to Points I through III in Appellant's brief is valid. Such a finding, Appellant argues, would require a second remand for sentencing. Appellant's Points I through III exclusively attack the validity of existing aggravating circumstances which this Court has previously affirmed. Therefore, we submit that there can be no compliance with the argument raised herein.

This Court has previously found that the trial judge used a "reasoned judgment" in arriving at the aggravating circumstances. Furthermore, the trial court has complied with this Court's directive and has articulated the mitigating circumstances considered in the imposition of sentence. Appellee is certain that an examination of the record and a balancing of the factors enumerated in aggravation and mitigation will result in an agreement that the sentence imposed is proper. Therefore, Appellee urges this Court to affirm the reasoning of the trial court and the sentence imposed.

CONCLUSION

Based upon the foregoing cases, authorities, and argument contained herein, Appellee, the State of Florida, respectfully requests that this Honorable Court affirm the sentence of death in the instant cause.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Barbara Ann Butler
Assistant Attorney General
125 No. Ridgewood Ave.
Fourth Floor
Daytona Beach, FL 32014
(904) 252-1067

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Phillip J. Padovano, Post Office Box 873, Tallahassee, Florida 32302 this 14th day of July, 1981.

Of Counsel

IN THE SUPREME COURT OF FLORIDA

PAUL EDWARD MACILL,

Appellant,

vs. CASE NO. 51,699

STATE OF FLORIDA,

Appellee.

APPELLANT'S REPLY BRIEF

PHILIP J. PADOVANO
Post Office Box 873
Tallahassee, Florida 32302
(904) 224-3636

ATTORNEY FOR PAUL EDWARD MACILL, APPELLANT

RECEIVED
AUG - 7 1981
ATTORNEY GENERAL
DAYTONA BEACH, FLA.

TOPICAL INDEX

ARGUMENT

POINT ONE

THE TRIAL COURT ERRONEOUSLY FOUND AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL..... 1

POINT TWO

THE TERM "HEINOUS, ATROCIOUS, AND CRUEL" HAS BEEN RENDERED UNCONSTITUTIONALLY VAGUE AND OVERBROAD DUE TO THE WIDE VARIETY OF SITUATIONS IN WHICH IT HAS BEEN APPLIED..... 6

POINT THREE

THE TRIAL COURT ERRED IN FINDING THREE SEPARATE AGGRAVATING CIRCUMSTANCES ALL WHICH WERE PROVED BY THE SAME EVIDENCE..... 10

POINT FOUR

THIS COURT SHOULD VACATE THE SENTENCE OF DEATH AND REMAND THE CASE WITH INSTRUCTIONS TO IMPOSE A SENTENCE OF LIFE IMPRISONMENT..... 12

POINT FIVE

IF THE COURT DOES NOT VACATE THE DEATH SENTENCE, THE CASE SHOULD BE REMANDED FOR A COMPLETELY NEW SENTENCING HEARING..... 13

CONCLUSION..... 14

CERTIFICATE OF SERVICE..... 14

TABLE OF AUTHORITIES

Alvord v. State, 322 So.2d 533 (1975) 8

Ball v. Yates, 29 So.2d 729 (Fla. 1947) 2

Brown v. State, 381 So.2d 690 (Fla. 1980) 8

Cooper v. Fulton, 158 So.2d 759 (Fla. 3d DCA 1963) 2

Cooper v. State, 336 So.2d 1133 (Fla. 1976) 7

Dixon v. State, 283 So.2d 1 (Fla. 1973) 3,7,8

Dougan v. State, 398 So.2d 439 (Fla. 1981) 3

Fleming v. State, 374 So.2d 954 (Fla. 1979) 7

Ford v. State, 374 So.2d 496 (Fla. 1979) 7

Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) 2,3

Gibson v. State, 351 So.2d 948 (Fla. 1977) 7

Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980) 8,9

Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976) 9

Hargrave v. State, 366 So.2d 1 (Fla. 1978) 7

Hart v. State, 5 So.2d 866 (Fla. 1942) 2

Harvard v. State, 375 So.2d 944 (Fla. 1979) 7

Holmes v. State, 374 So.2d 944 (Fla. 1979) 9

Kampff v. State, 371 So.2d 1007 (Fla. 1979) 7

Lewis v. State, 377 So.2d 640 (Fla. 1979) 8

Magill v. State, 386 So.2d 1188 (Fla. 1980) 1

Meeks v. State, 339 So.2d 186 (Fla. 1976) 5

Myers v. Atlantic Coastline Railroad Company, 112 So.2d 263 (Fla. 1959) 2

Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976) 6,9

Radford v. Palm Beach Shores, 267 So.2d 36 (Fla. 4th DCA 1972)..... 7

Raulerson v. State, 358 So.2d 826 (Fla. 1978)..... 8

Riley v. State, 366 So.2d 19 (Fla. 1978)..... 7

OTHER AUTHORITIES

§ 921.141(5)(b) Fla. Stat. (1972)..... 11

§ 921.141(5)(h) Fla. Stat. (1972)..... 4,6,7

Ga. Code §27-2534.1(b)(7)..... 8

ARGUMENT

POINT ONE

THE TRIAL COURT ERRONEOUSLY FOUND AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

The judgment and sentence of death entered by the trial court on remand contains a finding that the murder was especially heinous, atrocious and cruel. (RR-14-16)[1] The Defendant has contended that this finding was erroneous because there was no showing that the actual commission of the offense was accompanied by such additional acts as to set it apart from the norm of capital felonies. (Appellant's Brief, p. 3-6).

In answering this contention, the State has argued that the aggravating circumstances were approved by this court in its opinion on the first appeal and that the doctrine of the "law of the case" therefore precludes review in this appeal. This contention is based upon a misapplication of fundamental precepts of appellate practice.

In the first appeal of this case reported in Magill v. State, 386 So.2d 1188 (Fla. 1980), this Court affirmed the conviction, but vacated the sentence of death, remanding the case to the trial court for resentencing. The judgment of the court therefore, does not serve to "adjudicate" any issue relating to the propriety or impropriety of the aggravating circumstances originally applied by the trial judge. The remarks of this court in the Magill opinion relating to the sentencing were not a necessary part of the decision and therefore, they cannot be construed as the law of the case.

---

[1] The written order containing the trial court's findings of fact supporting the sentence of death on remand was separately mailed to this court on July 6, 1981.

One of the most basic rules in the application of the doctrine of the law of the case is that it applies only to issues actually adjudicated on appeal and does not extend to such issues as might have properly been adjudicated. See Ball v. Yates, 29 So.2d 729 (Fla. 1947). It is difficult to imagine how this court could have "adjudicated" any issue relating to the Appellant's sentence of death prior to the time it remanded the case to the trial judge for resentencing. Indeed this Court noted in Hart v. State, 5 So.2d 866 (Fla. 1942) that when a criminal conviction is affirmed, and the case is remanded for resentencing, those issues relating to the post-mandate sentencing procedure in the trial court are once again open for review.

It is true, as the State contends, that the opinion of this court in Magill contains language approving of the aggravating circumstances contained in the original sentencing order.[2] That language, however, is clearly "dicta" and as such, cannot be considered to be the law of the case. On many occasions, the Courts have reiterated the rule that the doctrine of the law of the case does not include language in a prior appellate opinion which was not necessary to the judgment. See e.g. Cooper v. Fulton, 158 So.2d 759 (Fla. 3rd DCA 1963) and Myers v. Atlantic Coastline Railroad Company, 112 So.2d 263 (Fla. 1959).

The State has attempted to analogize the remand in this case to the type of remand which is required when there has been a violation of the rule in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), but the two situations are not comparable. A "Gardner relief order" is entered for

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[2] Mr. Justice England concurred only in the result as to the portion of the opinion relating to the death sentence.

the expressed purpose of allowing the defendant to gain access to certain information considered at the sentencing; it is not the type of remand designed to reweigh and re-evaluate the balance between the aggravating circumstances and mitigating circumstances which may have existed. As this Court recently noted in Dougan v. State, 398 So.2d 439 (Fla. 1981), a remand for Gardner relief is a technically based remand serving the sole purpose of allowing counsel to see if there are any inproprieties in the presentence investigation. As such, it should not be considered as an opportunity to conduct a full blown sentencing hearing.

Nothing contained in the opinion of this court in the prior appeal could be construed as an express limitation upon the trial judge as to the matters he could consider or find at the resentencing. The trial judge evidently did not consider the remand to be restrictive in any way, for he conducted an entirely new sentencing hearing and prepared an entirely new sentencing order including his analysis of the mitigating circumstances and the aggravating circumstances.

In remanding this case for resentencing, the Court was of the opinion that the trial judge's failure to set forth his analysis of the applicable mitigating circumstances, if any, deprived the Defendant Magill of his opportunity for "meaningful review" of the sentence of death. The State's argument that some aspects of the death sentence have been approved by this court in advance of the resentencing by the trial court is inconsistent with the Court's expressed desire to provide a fair appeal of the death sentence. Surely the concept of "meaningful review" cannot exist by fragmenting the applicable sentencing issues and considering them piecemeal from one proceeding to the next.

A sentence of death can only be affirmed, reduced to life, or vacated. It cannot be partly affirmed and partly vacated. There is no middle ground which would permit the State to obtain a partial affirmance of some death penalty issues in a case which has been remanded for resentencing. Since the death sentence under review here was vacated and the case was remanded for resentencing, all arguments relating to the issue of sentencing are still open for review.

Finally, the State contends that irrespective of the procedural issue, the trial court was correct in finding that the murder was especially heinous, atrocious and cruel. This contention is without merit for there is nothing in the record to establish that the murder was "unnecessarily torturous" or that it was otherwise set apart from the "norm of capital felonies", Dixon v. State, 283 So.2d 1 (Fla. 1973).

A competent appellate advocate for the State could portray any first degree murder case in such a manner as to evoke a sense of disgust in the reader. None of these cases are pleasant. We must remember, however, that the task of the Court is to find aggravation sufficient to support the death penalty in only those cases which are especially heinous, atrocious and cruel. A careful examination of the State's arguments will demonstrate that all of facts alleged to support the section (5)(h) aggravating circumstance have already been used to establish the elements of the offense, or the existence of other aggravating circumstances.

Counsel for the State makes a lengthy recitation of the Defendant's confession, (Appellee's Brief, p. 13,14) but that succeeds only in establishing that he was guilty of the crime. There is no evidence contained in the confession which demonstrates that the victim died a lingering death or that she suffered unnecessarily. It may be, as the State argues, that the victim was shot "three times" with a ".44 caliber pistol", at such "close range" as to leave "powder

burns", (Appellee's Brief, p. 15), but those facts do not prove that the victim suffered a painful death. On the contrary, they tend to indicate that death came quickly. It may also be, as the State argues, that the Defendant committed the offense "deliberately", (Appellee's Brief, p. 15), but that much is necessary to establish the element of premeditation required in all first degree murder cases.

The State's reliance upon Meeks v. State, 339 So.2d 186 (Fla. 1976) is misplaced, for the affirmance of the death sentence in that case turned upon this Court's approval of the trial court finding that the murder was committed for the purpose of avoiding arrest or detection. In this case, the trial judge did not find as an aggravating circumstance, either in the first order or the order on remand, that the murder was committed to avoid arrest.

The State contends that the victim must have suffered "physical injury" prior to her death because she was abducted and raped by the Defendant. (Appellee's Brief, p. 15). These facts were considered by the trial judge in support of another aggravating circumstance (i.e. that the murder was committed while the Defendant was engaged in the commission of a rape) and should not be re-used to support a finding that the murder was especially heinous, atrocious and cruel.

The more detailed analysis of this issue in the Appellant's Main Brief demonstrates that there is nothing in the record of this case to support a finding that the murder was especially heinous, atrocious and cruel. The artfully drafted emotional argument of the State does not successfully rebut this contention.

POINT TWO

THE TERM "HEINOUS, ATROCIOUS, AND CRUEL" HAS BEEN RENDERED UNCONSTITUTIONALLY VAGUE AND OVERBROAD DUE TO THE WIDE VARIETY OF SITUATIONS IN WHICH IT HAS BEEN APPLIED.

The United States Supreme Court upheld the term "especially heinous, atrocious and cruel", contained in §921.141(5)(h) in Proffitt v. Florida, 428 U.S. 242, 49 L.Ed. 2d 913, 96 S.Ct. 2960 (1976) against a challenge of vagueness and overbreadth, but only because the few existing decisions of this Court as of the date of Proffitt cured the constitutional defects existing in the phrase, by construction. The Defendant respectfully submits that §(5)(h) has been rendered unconstitutionally vague and overbroad by the various and diverse interpretations and applications made of it by this Court in the five years since Proffitt. The meaning of the term "especially heinous, atrocious and cruel" is no longer clear to a person of average intelligence.

The State's first argument on this point is that the remand for resentencing was limited to the consideration of only certain sentencing issues, and that the consideration of this issue was foreclosed by the first opinion of this Court. That argument is without merit for the reasons previously given in this Brief. (Appellant's Reply Brief, p. 1-5)

Secondly, the State contends that the issue cannot be raised here because the argument was not made in the trial court. This argument is without merit for two reasons; (1) death sentence review is unique in that it is the only form of review which requires the Court to consider the propriety of the sentence irrespective of the arguments of counsel, and (2) the argument challenges the constitutionality of a statute necessary to support the sentence under review and therefore falls within the class of issues which may be raised for the

first time on appeal, see e.g. Radford v. Palm Beach Shores, 267 So.2d 36 (Fla. 4th DCA 1972).

Finally, the State challenges the Defendant's position on the merits. The fallacy of this argument made by the State is that it succeeds only in demonstrating factual differences in the cases and not substantive distinctions. Carried to its logical extreme all cases are factually different from each other. The Defendant's argument on this point, however, is that this Court has, wihtout reason or justification, applied the "principle" differently from one case to the next.

The Court has held that the §(5)(h) aggravating circumstance is not applicable where the victim is shot and dies quickly as a result,[3] yet in some cases where the victim apparently died instantaneously the Court has applied the aggravating circumstance.[4] The Court has held in one case that cruelty to another victim who did not die cannot be considered, and in another that it can.[5] The Court has said that §(5)(h) refers to a killing which is "unnecessarily torturous to the victim"[6] but applied it in the absence of any torture to the victim to cases where the killing itself was unnecessary.[7] The Court has found that §(5)(h) requires a showing of something more than

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[3]Cooper v. State, 336 So.2d 1133 (Fla. 1976) Kampff v. State, 371 So.2d 1007 (Fla. 1979) and Fleming v. State, 374 So.2d 954 (Fla. 1979).

[4]See e.g. Harvard v. State, 375 So.2d 833 (Fla. 1979).

[5]Compare Riley v. State, 366 So.2d 19 (Fla. 1978) with Gibson v. State, 351 So.2d 948 (Fla. 1977).

[6]State v. Dixon, 283 So.2d 1 (Fla. 1973).

[7]Hargrave v. State, 366 So.2d 1 (Fla. 1978) and Ford v. State, 374 So.2d 496 Fla. 1979).

that which appears in the average murder case under review[8], yet the Court has applied it upon facts which are necessary to prove the offense itself.[9] Finally, the Court has simply declined to explain in some cases the reason for applying the aggravating circumstance.[10]

This argument is made in recognition of the extremely difficult task presented by the responsibility to review death sentences, and with the utmost respect for the Court and its individual members. The unsuccessful effort to lend definition to the term "especially heinous, atrocious and cruel" is not a reflection of any weakness of the Court, rather it merely demonstrates that Mr. Justice Ervin was right when he predicted that the term could be applied to any murder case, State v. Dixon, 283 So.2d 1 (Fla: 1973) at 18, and that Mr. Justice England was right when he said that the Florida Death Penalty Statute "fosters rather than avoids the proscribed unbridled discretion Alvord v. State, 322 So.2d 533 (1975) at 541.

In Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980) the Court was presented with the question of whether the Georgia Supreme Court had adopted such a broad and vague construction of a similar aggravating circumstance[11] as to violate the Defendant's Eighth and Fourteenth Amendment Rights. The Court entertained this issue though it had upheld the validity of the aggravating circumstance four years earlier on the basis of then existing decisions of the Georgia Supreme Court. See, Gregg v. Georgia, 428 U.S. 153,

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[8] Lewis v. State, 377 So.2d 640 (Fla. 1979).

[9] In Raulerson v. State, 358 So.2d 826 (Fla. 1978), the Court found the existence of the aggravating circumstance because the murder was committed in a "cold and calculating" fashion. This language, however, adds nothing to the premeditation necessary to prove the offense itself.

[10] Holmes v. State, 374 So.2d 944 (Fla. 1979), Brown v. State, 381 So.2d 690 (Fla. 1980)

[11] Ga. Code §27-2534.1(b)(7) referring to murders which are "outrageously or wantonly vile, horrible and inhuman.

49 L.Ed.2d 859, 96 S.Ct. 2909 (1976). The Supreme Court found that the Georgia Court usually interpreted the Section consistently with the Constitutional requirements, but that it failed to do so in the case under review, Godfrey, 446 U.S. at 431,432.

The Godfrey decision did not adjudicate the question presented by this appeal but the Court did clearly warn of the dangers which may be encountered in the review of an essentially subjective aggravating circumstance. The Defendant respectfully submits that §(5)(h), no less than its Georgia counterpart, is susceptible of being applied as a "catch-all" aggravating circumstance which could by its very uncertainty be made to apply to any murder. Further, it is submitted that a review of the post-Proffitt cases will demonstrate that this section is actually being applied by the trial judges as a rule and not as an exception.

For these reasons, and those more fully advanced in the Main Brief, the Defendant contends that the angravating circumstance relating to murders which are "especially heinous, atrocious and cruel" has been rendered unconstitutionally vague and overbroad by construction.

POINT THREE

THE TRIAL COURT ERRED IN FINDING THREE SEPARATE AGGRAVATING CIRCUMSTANCES ALL WHICH WERE PROVED BY THE SAME EVIDENCE.

The State's argument that the remand for resentencing was limited to the consideration of only certain sentencing issues, and that the consideration of this issue was foreclosed by the first opinion of this Court is without merit for the reasons previously given in this Brief. (Appellant's Reply Brief, p. 1-5). The following reply will treat the arguments of the State on the merits of the point stated above.

The trial judge found a total of four aggravating circumstances, three of which (1,2,and 4) the Defendant contends were based upon the same evidence. The State's argument on this point merely addresses the question of whether two of those aggravating circumstances (2 and 4) overlap. The State has not addressed, leave alone explained, why the first aggravating circumstances does not constitute an impermissible duplication of the second and fourth.

The first finding the trial judge made in both the oral order and the written order, after making a statement of the case was as follows:

> (1) That three felonies, namely murder in the first degree involuntary sexual battery, and used or threatened to use in the process thereof a deadly weapon, and robbery in the course thereof carried a firearm were committed by the Defendant.

The statement makes no grammatical sense, but one would have to assume it had something to do with the trial judge's decision to sentence the Defendant to death, for it is contained in the formal findings used to support that decision.

In the Main Brief (p.10-12), the Defendant assumed that the trial judge

was applying §921.[illegible](b) Fla. Stat. (1972) relating previous convictions of a felony involving violence, inasmuch as the Defendant was convicted of rape and robbery simultaneously with his conviction for murder.[12] The argument then was that it would be improper to find this as an aggravating circumstance since the judge had also found:

> (2) The capital felony of murder was committed while the Defendant was engaged in the commission of or the flight after committing the crime of rape and robbery.
>
> and
>
> (4) The said capital felony was committed in connection of the crime of robbery which was perpetrated for pecuniary gain.

Counsel for the State has ignored the first paragraph of the trial judge's order altogether, perhaps assuming that it was merely a recitation of the facts and not an attempt to apply a statutory aggravating circumstance. The State's Brief proceeds upon the assumption that the trial judge found only a total of three aggravating circumstances, i.e. paragraphs 2, 3, and 4. (Appellee's Brief, p. 23). The sentence of death cannot be affirmed, however, by theorizing that the trial judge did not intend for the language contained in paragraph one of the order to constitute an aggravating circumstance.

The first paragraph of the order obviously constitutes an attempt to apply some form of aggravation. It could not have been intended as a mere recitation of the crimes for which the Defendant was convicted for the judge had already done that in the portion of the text of the order preceding the numbered findings. If it was not part of the justification for imposing the death penalty, then it should not have been placed in the written "findings" prepared for that purpose.

This error cannot be construed as harmless for the trial judge also found that there were three mitigating circumstances and that the mitigating circumstances did not outweigh the aggravating circumstances. The aggravating

[12] The Defendant believed this to be the most logical interpretation of the trial judge's intent since there is no statutory aggravating circumstance which relates soley to the use of a "deadly weapon" or "firearm."

circumstance related in paragraph one of the order, and considered as a part of the weighing process, was used again in paragraphs two and four. The death sentence should therefore be reversed.

POINT FOUR

THIS COURT SHOULD VACATE THE SENTENCE OF DEATH AND REMAND THE CASE WITH INSTRUCTIONS TO IMPOSE A SENTENCE OF LIFE IMPRISONMENT.

The arguments of the State on this point fail to demonstrate any error in the Defendant's contention that the mitigating circumstances in this case outweigh the aggravating circumstances.

The Court is not asked in this case to reverse the death sentence of a ruthless career criminal who had been given chance after chance by society to reform and who nevertheless had continued without remorse, to commit acts of violence upon others. Rather, the Court is asked to reverse the sentence of an emotionally deficient seventeen year old with no significant history of crime.

Surely the finding that the Defendant was only seventeen at the time of the offense should be given great weight. If he had been tried under the law in existence today, and not the law in existence in January of 1977, the case would have started out as a juvenile proceeding. Likewise, the finding that the Defendant does not have any significant history of criminal activity should be given great weight. Though the seriousness of the crime cannot be minimized, at least it could be said that the Defendant is not a person who failed to take advantage of prior acts of leniency on the part of the Court. Finally, we submit that the trial court's finding of the nonstatutory mitigating

circumstance relating to the emotional condition resulting from the death of the Defendant's father is amply supported by evidence. Testimony was presented that the Defendant had been under psychiatric or psychological treatment continuously from the age of 13 until the occurrence of the offense. (R-4-6).

The Court, of course, should take into consideration the jury's recommendation of death, but that should not ever be controlling. Part of the purpose of allowing sentence review in death penalty cases is to remedy a situation where the advisory verdict is no more than an emotional expression of the community's outrage about the crime. A careful, unemotional analysis of this case should result in a finding that the death penalty was an inappropriate punishment for this Defendant.

For these reasons and those expressed in the Main Brief, we submit that the order imposing the death penalty should be reversed.

POINT FIVE

IF THE COURT DOES NOT VACATE THE DEATH SENTENCE, THE CASE SHOULD BE REMANDED FOR A COMPLETELY NEW SENTENCING HEARING.

In response to the arguments of the State on this point, the Defendant relies upon the arguments originally made in the Main Brief. (Appellant's Brief, p. 15).

CONCLUSION

For the foregoing reasons, the Defendant submits that the decision of the trial court imposing the death sentence should be reversed.

Respectfully submitted,

PHILIP J. PADOVANO
Post Office Box 873
Tallahassee, Florida 32302
(904) 224-3636

ATTORNEY FOR APPELLANT, PAUL EDWARD MAGILL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Barbara Butler, Esquire, Assistant Attorney General, 232 Third Avenue, Second Floor, Daytona Beach, Florida 32014, this 3 day of August, 1981.

PHILIP J. PADOVANO

IN THE SUPREME COURT OF FLORIDA

PAUL EDWARD MAGILL,)
Appellant,)
vs.) CASE NO.: 51,699
STATE OF FLORIDA,) ORAL ARGUMENT HELD: November 5, 1981
Appellee.)

NOTICE OF SUPPLEMENTAL AUTHORITY

Pursuant to Fla.R.App.P. 9.210(g), Appellee hereby serves notice of its intention to rely upon the following supplemental authority which was referred to during oral argument by opposing counsel.

Eddings v. Oklahoma, No. 80-5727 (United States Supreme Court, argued November 2, 1981, decided January 19, 1982) [Bench opinion attached.]

The opinion stops short of suggesting that there is any constitutional proscription against imposition of the death penalty on a person who was under the age of eighteen (18) when the murder was committed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

By:
BARBARA ANN BUTLER
Assistant Attorney General
Suite 513
Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-3117

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail, to Philip J. Padavano, P.O. Box 873, Tallahassee, Florida 32302, this 28th day of January, A.D., 1982.

BARBARA ANN BUTLER
Assistant Attorney General

BAB/cma

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-

RECEIVED
DEC 8 1980
ATTORNEY GENERALS OFFICE

PAUL EDWARD MAGILL,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

Docketed
12-8-80
Florida Attorney
(General)

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PHILIP J. PADOVANO
Post Office Box 527
Tallahassee, Fla. 32302
(904) 224-2821

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW 5

STATEMENT OF THE CASE 6

A. Statement of the Facts 6

B. Trial Proceedings 8

C. Appellate Proceedings 10

REASONS FOR GRANTING THE WRIT 11

I. THE EXCLUSION FOR CAUSE OF A JUROR WHO EXPRESSED A CONSCIENTIOUS OBJECTION TO THE IMPOSITION OF THE DEATH PENALTY FOR PERSONS UNDER THE AGE OF TWENTY ONE DENIED PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS IN VIOLATION OF THE PRINCIPLES ANNOUNCED BY THIS COURT IN WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968). 11

II. THE EXCLUSION OF PETITIONER'S PENALTY PHASE TESTIMONY DESIGNED TO SHOW HIS REMORSE FOR THE OFFENSE CONSTITUTES AN IMPROPER RESTRICTION UPON THE PRESENTATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES AND THUS DENIES PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS IN VIOLATION OF THE RULE ANNOUNCED BY THIS COURT IN LOCKETT V. OHIO, 438 U.S. 586 (1978). 14

III. THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE TRIAL COURT'S FINDINGS AS TO THE AGGRAVATING CIRCUMSTANCES PRIOR TO THE REMAND TO THE TRIAL COURT FOR FURTHER CONSIDERATION OF THE APPLICABLE MITIGATING CIRCUMSTANCES VIOLATED PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Adams v. Texas, ___ U.S. ___, 65 L.Ed. 2d 581 (1980)	13,14
Boulden v. Holman, 394 U.S. 478 (1969)	12
Brady v. Maryland, 373 U.S. 83 (1963)	11
Davis v. Georgia, 429 U.S. 122 (1976)	12
Lockett v. Ohio, 438 U.S. 586 (1978)	2,14,15,16
Magill v. State, 383 So.2d 901 (Fla. 1980)	1,6,10
Maxwell v. Bishop, 398 U.S. 292 (1970)	12
Proffitt v. Florida, 428 U.S. 242 (1976)	17
Witherspoon v. Illinois, 391 U.S. 510 (1968)	2,11,12,13, 14

CONSTITUTIONAL AND STATUTORY AUTHORITIES

U.S. Const., Sixth Amendment	2
U.S. Const., Eighth Amendment	3
U.S. Const., Fourteenth Amendment	3
28 U.S.C. §1257(3)	2,11
Fla. Stat. Ann. 913.13	3,12
Fla. Stat. Ann. 921.141(1)(2)(3)(4)(5)(6)	3,4,5,17

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1980

No. 80-

PAUL EDWARD MAGILL,	)
	)
Petitioner,	)
	)
v.	)
	)
THE STATE OF FLORIDA,	)
	)
Respondent.	)

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner, PAUL EDWARD MAGILL, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Florida entered in these proceedings on May 8, 1980.

OPINIONS BELOW

The opinion of the Florida Supreme Court on the direct appeal of the Petitioner's conviction and sentence which is reported as Magill v. State, 383 So.2d 901 (Fla. 1980) is attached as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on May 8, 1980. A timely Motion for Rehearing was denied by the Court in an Order dated September 8, 1980, attached as Appendix B. An application for Extension of Time in which to file the Petition for Writ of Certiorari was timely filed in this Court and on October 7, 1980, Mr. Justice Powell granted an extension of time until December 7, 1980 for the filing of the Petition. Juris-

diction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the exclusion for cause of a juror who expressed a conscious objection to the imposition of the death penalty for persons under the age of Twenty one denied the Petitioner's Sixth and Fourteenth Amendment rights in violation of the principles announced by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968).

2. Whether the exclusion of Petitioner's penalty phase testimony designed to show his remorse for the act constitutes an improper restriction upon the presentation of non-statutory mitigating circumstances and thus denies Petitioner's Eighth and Fourteenth Amendment rights in violation of the rule announced by this Court in Lockett v. Ohio, 438 U.S. 586 (1978).

3. Whether the Florida Supreme Court affirmance of the Trial Court's findings as to the aggravating circumstances prior to the remand to the Trial Court for further consideration of the applicable mitigating circumstances violated Petitioner's Eighth and Fourteenth Amendment rights.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;

to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

United States Constitution, Eighth Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fla. Stat. Ann. 913.13 Jurors in Capital Ceses - A person who has beliefs which preclude him from finding a Defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case.

Fla. Stat. Ann. 921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty. - Upon a conviction or adjudication of guilt of a defendant of a capital felony, the Court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize

the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the Defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury - After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of the sentence of death.- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence. - The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating Circumstances. - Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under the sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especailly heinous, atrocious, or cruel.

(6) Mitigating circumstances. - Mitigating circumstances shall be the following;

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. The issue of whether the exclusion for cause of a juror who expresses a conscientious objection to the death penalty for persons under the age of Twenty one constitutes a denial of Petitioner's Sixth and Fourteenth Amendment rights was raised by objection in the Trial Court in argument in the Florida Supreme Court.

2. The issue of whether the exclusion of Petitioner's penalty phase testimony designed to show his remorse for the offense constitutes an improper restriction upon the presentation of non-statutory mitigating circumstances was raised by objection in the Trial Court and argument in the Florida Supreme Court.

3. The issue of whether the Florida Supreme Court's affirmance of the Trial Court's findings as to the aggravating circumstances prior to the remand to the Trial Court for further consideration of the applicable mitigating circumstances violated Petitioner's Eighth and Fourteenth Amendment rights was raised in Peti-

tioner's Motion for Rehearing before the Florida Supreme Court.

STATEMENT OF THE CASE

On March 21, 1977, a Circuit Court jury in Marion County, Florida, found the Petitioner, PAUL EDWARD MAGILL, guilty as charged of the premeditated murder of one Karen Sue Young, R-66B.[1] The Trial Judge accepted a recommendation of death made by the same jury, TR-612, adjudicated Petitioner guilty and sentenced him to die in the electric chair. R-75,76. The conviction was affirmed on direct appeal to the Florida Supreme Court on May 8, 1980 in the judgment sought to be reviewed by this Petition. (Appendix A) Magill v. State, 383 So.2d 901 (Fla. 1980). The Florida Supreme Court approved of the aggravating circumstances used by the Trial Court Judge in support of the judgment and sentence of death, but vacated the sentence and remanded the case for further proceedings as a result of the failure of the Trial Judge to "list the mitigating circumstances which he may or may not have considered." .id at 904.

A. Statement of the Facts

At approximately 8:00 p.m. on December 23, 1976, Danny Hall, age seventeen, rode his bike to the Jiffy Food Store located on Highway 27 south of Bellaview, Florida. He was halfway in the door of the convenience store when Petitioner, whom he had seen before, turned around and pointed a gun and told him to leave (TR-254-257). Danny Hall then left the store and rode his bike to the top of the hill where he watched Petitioner take a woman, known to him as Karen Young, from the store (TR-258-259).

Hall observed Petitioner and Young getting into a Mustang

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[1] In this Petition, "R" is a reference to the One volume record of the Pleadings and Orders, "TR" is a reference to the Four volume trial transcript, and "S" is a reference to the sentencing transcript.

automobile which proceeded toward Belleview. Several other customers testified that they observed a young man and woman in a Mustang automobile just prior to the time they entered the store and found it to be unattended TR-306-309 . The customers were greeted by Danny Hall who came running back to the store to call the Belleview police. TR-263,306 .

Officer John Harrison of the Belleview Police Department received a radio call at approximately 8:17 p.m. alerting him of the robbery and abduction and advising him of the description of the vehicle TR-286-287 . Harrison ultimately encountered the Mustang automobile described in the radio call and turned on his blue light in an attempt to stop it. TR-292-294. The driver of the Mustang, however, increased the speed of the vehicle and headed back toward the Jiffy Food Store. After a brief chase, Officer Harrison forced the Mustang off the road approximately two tenths of a mile north of the store TR-294. The driver of the vehicle, later identified as the Petitioner, got out of the car and ran to the rear where he was stopped by Officer Harrison TR-295.

Deputy Eddie Wright, Jr., of the Marion County Sheriff's Department was at the Jiffy Food Store and had watched Officer Harrison stop the vehicle and pat down the Petitioner TR-315-316. Deputy Wright proceeded to the area and advised Petitioner of his Miranda rights TR-317. After Wright told Petitioner that his car matched the description of a vehicle involved in a robbery and that he had run from a police vehicle, Petitioner started to sob and said that he did it TR-318. Wright asked what he had done and Petitioner said that he had robbed, raped, and killed her. Wright placed the Petitioner in his vehicle and called for an ambulance. He requested Petitioner to take him to where the girl was in hopes that she might not be dead. Petitioner said he was sure she was dead; that he had taken care of that TR-318. Following the Petitioner's directions, Deputy Wright then drove

to a secluded woody spot near Jaybird Point at Smith Lake where he found the body of Karen Sue Young TR-318-319.

Later that evening, Petitioner gave a tape recorded statement to Captain Gerard King of the Marion County Sheriff's Office. Petitioner admitted that he robbed the girl of an undetermined amount of money, and that he had intercourse with her TR-346-348. Petitioner told Captain King that he shot the victim three times with a .44 caliber pistol when he realized she could identify him TR-315-352. He then tried to drag the body into the bushes and put the gun in the trunk of his car TR-354.

A consent search of the vehicle produced a .44 caliber pistol TR-359,366, identified by the firearms expert as the weapon which discharged five spent .44 caliber cartridge cases found at the scene of the crime TR-406.

B. Trial Proceedings

The trial of this case began on March 21, 1977 in Marion County, Florida TR-6-211.

During the jury selection, the prosecutor asked a prospective juror if the fact that Petitioner was under the age of twenty one would affect his ability to find him guilty or to recommend the death penalty TR-22. Defense counsel objected to this line of questioning TR-22, but the objection was overruled by the Trial Judge TR-22-23.

Following the approval of this procedure, the prosecutor began to elicit the opinions of each of the prospective jurors as to the applicability of the death penalty to those under the age of twenty one. Prospective juror Best, who served on Petitioner's jury, promised the prosecutor "that the mere fact" that this Defendant may be under twenty one would not automatically make her recommend mercy to the Court TR-28. Prospective juror Hayward, who also served as a juror, affirmed that the "mere fact that this Defendant was under twenty one" would not influence his vote for or against capital punishment TR-30 and that he would judge Petitioner's crime just like anyone else TR-31. Propsective juror Rankin, who also

served on Petitioner's jury, affirmed that the "mere fact that the Defendant may be under the age of twenty one" would not influence him in voting for or against capital punishment TR-31.

Prospective juror Bonner responded to the question of whether the age of the Petitioner might affect her ability to make a finding of guilt or recommendation of death and answered in the affirmative TR-35. Mrs. Bonner initially affirmed that it would "influence" her TR-35. She then asked the prosecutor during the questioning session how old Petitioner was TR-35 and when the prosecutor declined to answer, TR-36, the juror informed him that Petitioner's age would operate as a bar to a finding of guilt TR-36. Following that answer, Mrs. Bonner was excused for cause over the objection of defense counsel Tr-37.

When a jury was qualified, the State called the witnesses at the scene of the Jiffy Food Store, the police officers and various technical witnesses who established the facts of the offense referred to above.

Petitioner took the stand on his own behalf and after relating a history of psychological problems, told the jury that he committed the offenses impulsively TR-420. He said that at the time, he did not feel that he had any control over his actions TR-420-422 and that it was "totally against [his] thinking to harm a person like that" TR-428.

The jury returned a verdict finding the Petitioner guilty as charged of the offenses of murder in the first degree, involuntary sexual battery, and armed robbery R-66-66A-66B. The State produced no evidence of aggravating circumstances in the sentencing phaseof the trial which began shortly after the verdicts were announced TR-498. Petitioner testified on his own behalf during this portion of the trial TR-553 and called other witnesses to establish the existence of certain mitigating factors.

Petitioner was asked by defense counsel how he felt about having committed the offense in question, but the prosecutor's objection to the question was sustained TR-566. Defense counsel then

asked the Petitioner if he had any statement he wished to make to the jury concerning the offense TR-566 but the prosecutor's objection to that question was likewise sustained TR-566. The Trial Judge explained to the jury that he was "sustaining the objections because [the questions] fall without purview of these factors set forth by statute, by the legislature, which you should consider in mitigation" [sic].

The jury returned an advisory verdict recommending the imposition of the death penalty TR-612 which was ultimately accepted by the Trial Court at sentencing. The Trial Court found as aggravating circumstances that the homicide was committed while Petitioner was engaged in the commission of robbery and rape, that the offense was especially heinous, atrocious and cruel, and that the offense was committed for pecuniary gain R-78-79.

C. Appellate Proceedings

Petitioner's judgment and sentence were affirmed on May 8, 1980, in a direct appeal to the Florida Supreme Court (Appendix A), Magill v. State, 383 So.2d 901 (Fla. 1980). A timely Petition for Rehearing was denied on September 8, 1980 (Appendix B).

The Court, in affirming the conviction, rejected Petitioner's contention that the prosecutor improperly questioned prospective jurors concerning their views as to the application of the death penalty to persons under the age of twenty one. The Court further held that Juror Bonner was properly challenged for cause by the prosecution because "it was apparent from the examination that she would be unable to follow the law because of her bias or predjudice toward inflicting the death penalty upon those under the age of twenty one years". id at 903.

The Petitioner's contention that his penalty phase testimony was improperly restricted was also rejected in the direct appeal. The Court reasoned that although the state of mind of the murderer during or immediately after the commission of the crime may legitimately be examined for remorse, his state of mind three or four months later when facing the death penalty, "may or may not be relevent". id at 904.

Although the Florida Supreme Court ultimately remanded this case for resentencing, it nevertheless considered the "propriety of the death sentence." The language of the opinion supports the Trial Court's finding that the capital felony was especially heinous, atrocious and cruel as well as the finding of the lower Court that the offense was committed in the course of a robbery and rape.

THE JUDGMENT OF THE FLORIDA SUPREME COURT IS A "FINAL JUDGMENT".

Although the Florida Supreme Court vacated the sentence of death and remanded the case for further sentencing proceedings before the Trial Judge, the Federal questions decided by the Court in determining the Petitioner's conviction and in approving the propriety of the penalty phase proceedings before the jury cannot be raised again in the State Courts. The judgment of the Florida Supreme Court on the Federal Constitutional issues sought to be reviewed by this Petition for Writ of Certiorari is therefore a "Final Judgment" within the meaning of 28 U.S.C. §1257(3). Brady v. Maryland 373 U.S. 83 (1963).

REASONS FOR GRANTING THE WRIT

ONE

THE EXCLUSION FOR CAUSE OF A JUROR WHO EXPRESSED A CONSCIENTIOUS OBJECTION TO THE IMPOSITION OF THE DEATH PENALTY FOR PERSONS UNDER THE AGE OF TWENTY ONE DENIED PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS IN VIOLATION OF THE PRINCIPLES ANNOUNCED BY THIS COURT IN WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968).

It is now well settled that a prospective juror in a capital case may not be excused for cause as a result of his general opposition to the death penalty. The decisions of this Court have made it clear that a juror may not be excused for cause in such a case because of his views on the death penalty unless those beliefs would interfere with his ability to follow the law applicable

to the case. Witherspoon v. Illinois, 391 U.S. 510 (1968), Boulden v. Holman, 394 U.S. 478 (1969) and Maxwell v. Bishop, 398 U.S. 292 (1970). If only one venireman was improperly excused for cause because he voiced general objections to the death penalty, the death sentence cannot be carried out. Davis v. Georgia, 429 U.S. 122 (1976).

Petitioner respectfully submits that the voir dire procedure used in his trial fails to meet the minimum Constitutional standard set by this Court for jury selection in capital cases. The prosecutor was not only permitted to obtain a "death inspired" jury, but he was allowed to narrow the panel down to those prospective jurors who were predisposed to reject the statutory mitigating circumstance relating to age.

The Trial Judge permitted the prosecutor to obtain a commitment from each juror that the Petitioner's youthful age would not affect the juror's ability to make a finding of guilt or recommend the imposition of the death penalty. This in itself is a violation of the Petitioner's Sixth and Fourteenth Amendment rights [2] as Witherspoon only allows for the exclusion of jurors who hold such rigid opposition to the death penalty that they could not follow the Court's instruction on the law.

Many of the jurors selected in this case assured the prosecutor that they mere fact that the Petitioner was under twenty one would not influence their vote for or against the imposition of the death penalty TR-25,26,28,30,31. Juror Bonner conceded that the Defendant's age would influence her ability to recommend the death penalty TR-35 and was ultimately excused for cause over the objection of defense counsel TR-37.

It was not explained to any of the jurors that the Petitioner's youthful age would have been a mitigating factor under §921.141(6)(g) which they may have legitimately taken into consideration in arriving at their recommended disposition. The prosecutor's ques-

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[2] The questions were also improper under 913.13 Fla. Stat. which provides that jurors in capital cases shall be disqualified only if their views preclude them from finding a defendant guilty.

tions implied that it would be improper for the jurors to show mercy on a Petitioner because of his young age. Moreover, the exclusion of jurors who might have been affected by his youthfulness was tantamount to the exclusion of jurors for no more than an expression of their ability to follow the law which allows them to consider age as a mitigating circumstance.

This Court reasoned in Witherspoon that "a man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him... and can thus obey the oath he takes as a juror". id at 519. It was upon that rationale that the Court concluded that by excluding all those who opposed capital punishment, the State "crossed the line of neutrality" and "produced a jury uncommonly willing to condemn a man to die". id at 520. Surely it cannot be said to be any less of a constitutional intrusion to exclude those who favor capital punishment generally but admit that a persons' age might affect the decision to impose the death penalty in a given case.

This Court recently held in Adam v. Texas , ___ U.S. ____ 65 L.Ed. 2d 581 (1980) that the Witherspoon doctrine is applicable to bifricated capital trials. The Court held in that case that it was error of constitutional dimension to exclude jurors who are unable to take an oath that the mandatory penalty of death or imprisonment for life would not "affect [their] deliberations on any issue of fact". In this case, no less than in Adams, the exclusion of those who might be "affected" by Petitioner's age, requires a reversal of the conviction.

It is quite true that Juror Bonner was ultimately forced to admit that her views would preclude her from returning a guilty verdict. However, this occurred only after the prosecutor was allowed to question her improperly. He asked her for her opinion about executing young people without answering her question as to the Petitioner's age, and without explaining to her that it is perfectly proper under the Florida law to consider age as a mitigating factor. Surely her answers under these circumstances cannot be taken as an expression of her inability to follow the law.

The procedure adopted in this case and approved by the Florida Supreme Court below, is clearly at odds with the principles set forth in Witherspoon and Adams, supra. The exclusion for cause of prospective jurors simply because they indicate that Defendant's age might affect their recommendation as to the imposition of the death penalty constitutes a plain violation of the Sixth and Fourteenth Amendment. For these reasons, the Petitioner respectfully submits that this Court should give plenary consideration to the argument made by granting the Petition for Writ of Certiorari.

TWO

THE EXCLUSION OF PETITIONER'S PENALTY PHASE TESTIMONY DESIGNED TO SHOW HIS REMORSE FOR THE OFFENSE CONSTITUTES AN IMPROPER RESTRICTION UPON THE PRESENTATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES AND THUS DENIES PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS IN VIOLATION OF THE RULE ANNOUNCED BY THIS COURT IN LOCKETT v. OHIO, 438 U.S. 586 (1978).

The penalty phase of the bifricated trial proceedings center around an analysis of Petitioner's emotional and psychological problems. Although he testified, he was not permitted to explain to the jury how he felt about the commission of the offense. Nor was he allowed to make a general statement of his own to the jury as is indicated by the following portions of the record:

> DEFENSE COUNSEL: (Questioning Petitioner) How do you feel at this time, Paul, concerning the acts that you have done?
>
> PROSECUTOR: Objection, Your Honor. He's asking how he feels as to some act he's done, and that calls for a conclusion of the witness. How he feels is not pertinent to phase two of this proceeding.
>
> THE COURT: Objection sustained.
>
> DEFENSE COUNSEL: Do you have any statement you would like to make at this time, Paul?
>
> PROSECUTOR: Objection, Your Honor. Any statement--he should ask the witness a question, Your Honor.
>
> THE COURT: Sustained.

TR-566. The prosecutor's objection was sustained on the ground that

Defense counsel's questions did not elicit any information which would be relevant to the statutory mitigating circumstances. The Trial Judge explained his ruling to the jury as follows:

> THE COURT: Sustained. Members of the jury, we'll complete this and hear arguments of counsel and the Court will read to you what factors you are to consider in aggravation and in mitigation and I'm sustaining the objections because they fall without purview of these factors set forth by the statute, by the legislature, which you should consider in mitigation. Therefore, the objection is sustained in this case. You understand that. TR-566-567.

There can be no question but that the Trial Judge believed that the testimony presented during the penalty phase trial must be limited to the statutory mitigating circumstances. Therefore, his ruiling is directly contrary to the principle of law set forth by this Court in Lockett v. Ohio, 438 U.S. 586 (1978).

In the Lockett case, the Court held that statutory restrictions upon relevant mitigating factors in capital cases are constitutionally inpermissible. The Court noted that the "Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a Defendant's character or record and any of the circumstances of the offense that the Defendant profers as a basis of the sentence less than death." id at 604.

It can hardly be argued that the instant case meets the constitutional standard set forth by the Court in Lockett in view of the fact that the Trial Judge refused to allow Petitioner to give "his own statement" to the jury in mitigation. The strict adherence to the admonition of this Court that the Defendant should be allowed to present any aspect of his character or record and any of the circumstances of the offense that he profers requires a refersal of the conviction below. The Trial Judge was not at liberty to exclude from the jury the Defendant's personal statement about the commission of the crimes before he heard it. At the very least, it is clear that the objection was improerly sustained upon the ground that the question was not within the "purview" of the statutory mitigating circumstances.

This Court's decision in Lockett v. Ohio, supra, was cited to the Florida Supreme Court in the Petitioner's Motion for Rehearing (Appendix B), but it was not discussed by the Court. In the original opinion, the Court ruled that the testimony "may or may not be relevent" and that its exclusion was harmless error in any case. 383 So. 2d at 904. The risk of excluding possibly relevent evidence, however, as noted by this Court in Lockett, is that "the death penalty will be imposed in spite of factors which may call for a less severe penalty" 438 U.S. at 605.

For each of the foregoing reasons, Petitioner respectfully submits that the Trial Court improperly restricted the testimony in mitigation he proferred during the penalty phase trial. The exclusion of this evidence, approved by the Florida Supreme Court, constitutes a violation of Petitioner's Eighth and Fourteenth Amendment rights.

THREE

THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE TRIAL COURT'S FINDINGS AS TO THE AGGRAVATING CIRCUMSTANCES PRIOR TO THE REMAND TO THE TRIAL COURT FOR FURTHER CONSIDERATION OF THE APPLICABLE MITIGATING CIRCUMSTANCES VIOLATED PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

This case was ultimately remanded to the Trial Court for resentencing. Nevertheless, the Florida Supreme Court "consider[ed] the propriety of the death sentence" 383 So.2d at 904.

Although it was unnecessary to do so, the Court approved of the Trial Court's finding that the homicide was especially heinous, atrocious and cruel as well as the Trial Court's finding that the Defendant killed his victim to avoid identification. The State Appellate Court concluded that "it is apparent that the Trial Judge used a reasoned judgment and, in the absence of sufficient mitigating circumstances, the death penalty was justified" 383 So.2d at 904.

Petitioner respectfully submits that the Florida Supreme Court has prejudged the issues which may arise at resentencing. The untimely expression of the Court's opinion is sure to deprive Petitioner of his right to a fair and impartial sentencing hearing. Likewise, it will surely deprive him of his right to a fair and impartial appeal to the Florida Supreme Court in the event the Trial Court reinstates the death penalty.

One of the primary reasons for upholding the Florida death penalty statute, is that it provides a guaranteed direct review of the sentence by the Florida Supreme Court. This Court in Proffitt v. Florida, 428 U.S. 242 (1976), said:

> "...Finally, the Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of defendants. The Supreme Court of Florida reviews each death sentence to insure that similar results are reached in similar cases, id at 258
>
> "...is apparent that the Florida Court has undertaken responsibility to perform its function of death sentence review with a maximum of rationality and consistency... id at 259
>
> "...any suggestion that the Florida Court engages in only cursory or rubber stamp review of death penalty cases is totally controverted by the fact that it has vacated over one third of the death sentences that have come before it. id at 259."

The "rationality and consistency" of review which apparently impressed this Court in Proffitt was totally lacking in this case. Surely the Court did not approve of a procedure whereby the death penalty would be imposed by some piecemeal method of reviewing the applicable factors.

Meaningful appellate review of thesentence itself is a necessary element of the constitutionality of the Florida capital penalty statute. The review can hardly be characterized as meaningful if, in a case such as this one, the Supreme Court announces in advance that it will approve certain findings the Trial Court may make on remand.

Petitioner respectfully submits that the Court should grant certiorari to correct the unconstitutional application of §921.141 (Fla. Stat.) by the Florida Supreme Court.

CONCLUSION

For all the reasons stated above, Petitioner respectfully requests that this Court gran a Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

PHILIP J. PADOVANO
Post Office Box 527
Tallahassee, Florida 32302
(904) 224-2821

ATTORNEY FOR PETITIONER

DATED this 5 day of December, 1980.

PHILIP J. PADOVANO

[2] The appellants contend that the statute violates equal protection by the special treatment it gives to police officers as victims of batteries. This issue has been resolved in favor of the statute's validity. *Soverino v. State*, 356 So.2d 269 (Fla.1978).

[3] The appellants contend that as a matter of law the verdict is not supported by substantial evidence. Our review of the record reveals that this contention is without merit.

[4] Appellants contend that the statute fails to give sufficient warning as to what conduct will render a person liable to prosecution for the felony created thereby as opposed to prosecution for ordinary battery. The statute, however, has a scienter requirement. *State v. Bailey*, 360 So.2d 772 (Fla.1978). It requires that the accused know that his victim is a law enforcement officer or firefighter. Appellants argue that the phrase "engaged in the lawful performance of his duties" is vague and raise the question of whether a policeman who is using excessive force is so engaged. But the use of unlawful force by a police officer, giving rise to a right of self-defense, would not relate to the matter of sufficient notice but would be a defense to the battery charge itself. As a matter of common understanding and practice, the statute conveys sufficiently definite warning as to what is proscribed. *Zachary v. State*, 269 So.2d 689 (Fla.1972).

[5, 6] Finally, appellants argue that the statute violates due process by overbreadth, in that it could be applied to conduct that should only be punished as a misdemeanor. Overbreadth attack is only proper when the statute could be applied to innocent, protected activity, which does not include battery. *Pruitt v. State*, 363 So.2d 552 (Fla. 1978); *State v. Bales*, 343 So.2d 9 (Fla.1977).

The judgment is affirmed.

It is so ordered.

ENGLAND, C. J., and ADKINS, OVERTON and SUNDBERG, JJ., concur.

Paul Edward MAGILL, Appellant,

v.

STATE of Florida, Appellee.

No. 51699.

Supreme Court of Florida.

May 8, 1980.

Defendant was convicted in the Circuit Court, Marion County, William T. Swigert, Sr., J., of murder in the first degree and was sentenced to death. Defendant appealed. The Supreme Court, Adkins, J., held that: (1) denial of a continuance to allow defendant to take the deposition of an examining psychiatrist was not an abuse of discretion; (2) a juror who would not vote for a conviction of first degree murder because of her objection to applying the death penalty to a defendant under the age of 21 years was properly excused for cause; (3) the prosecutor was properly allowed to cross-examine defendant during the sentencing phase as to defendant's thinking and acting out what occurred beyond the robbery; and (4) the trial judge was required to articulate mitigating circumstances considered by him.

Affirmed in part, vacated in part, and remanded.

England, C. J., concurred in the affirmance of conviction, but incurred as to the vacation of the sentence in result only.

1. Criminal Law ⇐586, 1151

Application for continuance is addressed to sound judicial discretion of trial court and denial of such motion should not be reversed by appellate court unless there has been palpable abuse of this judicial discretion, which appears clearly and affirmatively in record.

2. Criminal Law ⇐394(1)

In prosecution for first degree murder, denial of continuance to allow defendant to

Appendix "A"

depose examining psychiatrist was not abuse of discretion.

3. Criminal Law ⇐730(1)

In prosecution for first degree murder, any misstatement by state attorney concerning function and duties of jury was cured by appropriate instructions from trial court.

4. Criminal Law ⇐1166.16

In first degree murder prosecution, unreported bench conferences held during voir dire examination of jury did not constitute reversible error.

5. Jury ⇐108

In first degree murder prosecution, prospective juror, who would not vote for conviction of first degree murder, regardless of evidence, because of her objection to applying death penalty to defendant on basis of his age, was properly excused for cause.

6. Witnesses ⇐277(4)

In sentencing phase of first degree murder prosecution, prosecutor was properly allowed to cross-examine defendant regarding his thoughts and actions during murder where defendant had testified as to his mental state before murder.

7. Criminal Law ⇐1170(2)

In sentencing phase of prosecution for first degree murder, trial court's refusal to allow defendant to answer question as to whether he felt remorse for crime was not reversibly erroneous where defendant was allowed to bring out remorse as mitigating factor in many other instances.

8. Homicide ⇐354

Cold calculated design to kill constitutes especially heinous, atrocious, or cruel murder and may constitute aggravating circumstance warranting imposition of death penalty.

9. Criminal Law ⇐986(3)

Before imposing death sentence, trial judge was required to articulate any mitigating circumstances considered by him.

Michael J. Minerva, Public Defender, and Margaret Good, Asst. Public Defender, Tallahassee, for appellant.

Jim Smith, Atty. Gen., Michael H. Davidson, Charles A. Stampelos and Raymond L. Marky, Asst. Attys. Gen., Tallahassee, for appellee.

ADKINS, Justice.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and a sentence of death.

The defendant, Magill, seventeen years of age at the time, robbed a small store, abducted the female attendant, raped her, and then killed her. An indictment was returned on January 6, 1977, and defendant was arraigned on January 17, 1977, at which time the public defender was appointed to represent the defendant. On February 1, 1977, the court ordered an examination of defendant to determine his competency to stand trial. On March 4, 1977, the defendant filed a motion for continuance on the ground that he had not yet received the reports of the appointed psychiatrists. The reports of the psychiatrists were filed on March 8 and March 14. The defendant filed a notice of intent to rely upon the defense of insanity on March 16; on the same day he filed another motion for continuance on the ground that he had been unable to take the deposition of the examining psychiatrists. The trial began on March 21, 1977.

Defendant says the trial court committed reversible error in denying the motions for continuance. The psychiatric evaluations were performed to determine defendant's competency to stand trial. Those reports conclude the defendant was competent to stand trial and was sane at the time of the commission of the offense. The testimony of the psychiatrists would be inadmissible on the issue of guilt. In *Campbell v. State*, 227 So.2d 873 (Fla.1969), we held that the proffered testimony of a psychiatrist that the defendant, though able to distinguish between right and wrong, had a mental deficiency, and might not be able to con-

form his acts to the requirements of law, was not relevant to the question of whether or not the defendant was legally insane under the *McNaghten* test. Such testimony was, therefore, inadmissible.

[1, 2] In criminal cases an application for a continuance is addressed to the sound judicial discretion of the trial court, and the denial of such a motion should not be reversed by an appellate court unless there has been a palpable abuse of this judicial discretion. This abuse of discretion must clearly and affirmatively appear in the record. *Pittman v. State*, 51 Fla. 94, 41 So. 385 (1906). There has been no showing of palpable abuse of discretion and we therefore refuse to say the trial court committed error.

[3] Defendant next contends that during voir dire examination, the state attorney gave an erroneous explanation of the function and duties of the jury. This contention is without merit. The trial court instructed the jury as to their duties and functions, and these instructions were correct. Any misstatement by the state attorney during the voir dire examination was cured by appropriate instructions from the court.

[4] During voir dire examination of the jury several unreported bench conferences were held. We do not approve unreported bench conferences, but under the record of this case, the defendant has failed to show reversible error.

[5] Defendant says that the trial court committed error in excusing Juror Bonner for cause. In support of this contention defendant cites *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), where the principle is established that a prospective juror cannot be excused for cause in a capital case simply because the juror is opposed to the death penalty. However, *Witherspoon* also says the court may exclude a venireman whose objections to the death penalty interfere with his or her ability to follow the law in the case.

The record discloses that Juror Bonner would not vote for a *conviction* of first degree murder, regardless of the evidence, because of her objection to applying the death penalty to a defendant on the basis of age. It was apparent from the examination that she would be unable to follow the law because of her bias or prejudice towards inflicting the death penalty upon those under the age of twenty-one years. As Juror Bonner was properly excused, this contention of the defendant is also without merit.

[6] During the sentencing phase of the proceedings, the defendant's attorney attempted to limit the scope of direct examination of the defendant to a time frame prior to the robbery so as to show his understanding of emotional conflicts and reasons for the robbery. Defendant says that, over repeated objections, the prosecutor was permitted to cross-examine him on his thinking and acting out what occurred beyond the robbery. Actually the prosecutor attempted to stress the aggravating circumstances during his cross-examination of defendant in the sentencing phase. In *State v. Dixon*, 283 So.2d 1, 7 (Fla.1973), we said:

> Another advantage to the defendant in a post-conviction proceeding, is his right to appear and argue for mitigation. The State can cross-examine the defendant on those matters which the defendant has raised, to get to the truth of the alleged mitigating factors, but cannot go beyond them in an attempt to force the defendant to prove aggravating circumstances for the State. A defendant is protected from self-incrimination through the Constitutions of Florida and of the United States. Fla.Const., art. I, § 9, F.S.A., and U.S.Const., Amend. V. In no event, is the defendant forced to testify. However, if he does, he is protected from cross-examination which seeks to go beyond the subject matter covered on his direct testimony and extend to matters concerning possible aggravating circumstances.

The defendant raised the matter of "Paul's emotional turmoil and problems" for consideration as a mitigating circumstance. Defendant claims that the exposi-

tion of that topic was strictly limited to his mental state prior to the robbery and that, therefore, the state exceeded the proper bounds of cross-examination when the state explored defendant's mental state in regard to the rape and murder of the victim. If the defendant opens the door as to his mental state prior to and during the commission of a crime, the state, during the sentencing procedure, is free to explore that area on cross-examination. Such cross-examination may be geared toward the mental attitude of defendant for a reasonable time after the commission of the crime.

[7] Defendant complains because he was not allowed to answer the question, "How do you feel at this time, Paul, concerning the acts that you have done?" The state of mind of a murderer during or immediately after the commission of the crime may be legitimately examined for remorse. His state of mind three or four months later, when facing the death penalty, may or may not be relevant. In any event, the record shows many instances where defendant was allowed to bring out remorse as a mitigating factor. The error if any, in not allowing defendant to once again express remorse is harmless.

[8, 9] We next consider the propriety of the death sentence. The record clearly shows that defendant first robbed the victim and kidnapped her while in the process of fleeing the site of the robbery. He then took the victim to a wooded area and raped her. As they were returning to the car after the rape, the victim begged that she not be injured. Defendant realized that she would be able to identify him, so he shot her three times, "twice in the head and once in the chest." Defendant reaffirmed the details of a confession while on the stand at trial, although he attempted to recant the portion of his confession where he stated that he had killed the victim to avoid identification. The jury obviously believed the confession and not the recantation. This is well within their province. *Alvord v. State*, 322 So.2d 533 (Fla.1975); *Ford v. State*, 251 So.2d 562 (Fla.3d DCA 1971); *Wilson v. State*, 208 So.2d 479 (Fla.3d DCA 1968). The record shows that the victim was shot in the head and fell to the ground, after which defendant deliberately shot her twice more, once in the head and once in the chest. The chest shot was at such close range that it left powder burns. The record is clear that defendant had a cold, calculated design to effect the death of the helpless victim. This is evident from the number of times defendant shot the victim with his .44 caliber pistol, the proximity of the muzzle of the pistol to the victim's chest, and defendant's statement to the police that he shot her to avoid identification and made sure that she was dead. A cold, calculated design to kill constitutes an especially heinous, atrocious, or cruel murder. *Alvord v. State*, supra; *Sullivan v. State*, 303 So.2d 632, 637 (Fla.1974).

In *Meeks v. State*, 339 So.2d 186 (Fla. 1976), the victim was killed to avoid identification. Meeks was only twenty-one years of age, Magill was nearly eighteen. Meeks robbed a convenience store immediately preceding the murder. Magill robbed a convenience store and raped the victim preceding the murder. The only significant factual difference between *Meeks* and the case before us is that in *Meeks* the defendant did not rape his victim before he murdered her. The death penalty was awarded in *Meeks*.

Defendant's reliance upon *Halliwell v. State*, 323 So.2d 557 (Fla.1975), is not well placed. The defendant in *Halliwell* was involved in a love triangle which culminated in defendant's beating the husband to death after the husband had beat the wife. The motive was certainly different.

It is apparent that the trial judge used a reasoned judgment and, in the absence of sufficient mitigating circumstances, the death penalty was justified. The Court found that there were "no mitigating circumstances which outweigh the aforementioned aggravating circumstances." However, the court did not specifically list the mitigating circumstances which he may or may not have considered. Even though the trial judge may have considered some mitigating circumstances, he is charged with

the further responsibility of articulating them, so as to provide this Court with the opportunity of giving a meaningful review of the sentence of death. As stated in *State v. Dixon*, 283 So.2d at 8:

> The fourth step required by Fla.Stat. § 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of roles provided by the statute.

A most important safeguard is the propounding of aggravating and mitigating circumstances, which are determinative of the sentence imposed. Under the circumstances, it is necessary for us to set aside the sentence of death and remand the case to the trial judge for the purpose of making proper findings of fact and then, imposing an appropriate sentence. It is, of course, unnecessary to impanel another jury.

The judgment of conviction is affirmed. The sentence of death is vacated and the cause remanded to the trial judge for further proceedings consistent with this opinion.

It is so ordered.

BOYD, OVERTON and ALDERMAN, JJ., concur.

ENGLAND, C. J., concurs fully in the affirmation of Magill's conviction but in result only as to the vacation of Magill's sentence.

Richard David DOERR, II, Petitioner,

v.

STATE of Florida, Respondent.

No. 52275.

Supreme Court of Florida.

May 8, 1980.

The District Court of Appeal, 348 So.2d 938, certified a question to the Supreme Court. The Supreme Court, Alderman, J., held that Florida statute relating to person taking child into custody notifying parents or legal custodians of the child does not require that every confession by a juvenile after he is taken into custody be automatically rendered inadmissible if it were given prior to notification of his parents or legal guardians.

Order accordingly.

Adkins, J., filed a dissenting opinion in which Boyd and Sundberg, JJ., concurred.

1. Infants ⇐16.8

Florida statute relating to person taking child into custody notifying parents or legal custodians of the child does not require that every confession by a juvenile after he is taken into custody be automatically rendered inadmissible if it were given prior to notification of his parents or legal guardians. West's F.S.A. § 39.03(3)(a).

2. Infants ⇐16.7

Notification of parents or legal custodians of juvenile taken into custody is required only after it is determined that child will be detained or placed in shelter care. West's F.S.A. § 39.03(3)(a).

3. Infants ⇐16.4

Statute relating to notification of parents or legal custodians of child taken into custody does not prohibit interrogation after child is taken into custody but before determination is made to release or detain. West's F.S.A. § 39.03(3)(a).

Supreme Court of Florida

MONDAY, SEPTEMBER 8, 1980

RECEIVED
2nd JUDICIAL CIRCUIT

PAUL EDWARD MAGILL,

Appellant, *

vs. * CASE NO. 51,699

STATE OF FLORIDA, Circuit Court Case No. 77-19
(Marion County)

Appellee. *

The opinion filed May 8, 1980, has been revised and the last sentence on page 4 has been eliminated.

The Motion for Rehearing and response thereto, having been considered in light of the revised opinion are hereby denied.

ADKINS, Acting Chief Justice, BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., Concur

The motion to stay issuance of mandate filed by attorney for appellant is granted and proceedings in this Court and in the Circuit Court of the Fifth Judicial Circuit, in and for Marion County, Florida, are hereby stayed to and including October 8, 1980, to allow appellant to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

JB

A True Copy

TEST:

Sid J. White, Clerk
Supreme Court of Florida.

cc: Hon. Frances E. Thigpen, Clerk
Hon. William T. Swigert, Sr., Judge
Margaret Good, Esquire
Charles A. Stampelos, Esquire

NO. 80-5852

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

PAUL EDWARD MAGILL,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

Received
1-7-81

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT STATE OF FLORIDA IN OPPOSITION TO PETITION FOR CERTIORARI

JIM SMITH
ATTORNEY GENERAL

RAYMOND L. MARKY
ASSISTANT ATTORNEY GENERAL

COUNSEL OF RECORD

LAWRENCE A. KADEN
ASSISTANT ATTORNEY GENERAL

OF COUNSEL

THE CAPITOL, 1502
TALLAHASSEE, FL 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

QUESTION PRESENTED

DOES THIS COURT HAVE JURISDICTION PURSUANT TO 28 U.S.C. § 1257(3) TO REVIEW A DECISION OF THE SUPREME COURT OF FLORIDA WHICH HAS VACATED A DEATH SENTENCE AND REMANDED THE CASE TO THE TRIAL COURT FOR FURTHER PROCEEDINGS FOR WHICH A DIRECT APPEAL WOULD LIE REGARDLESS OF WHETHER PETITIONER ULTIMATELY RECEIVES A SECOND DEATH SENTENCE OR A SENTENCE OF LIFE IMPRISONMENT?

PARTIES

In the Supreme Court of Florida, Petitioner was the appellant and the State of Florida was the appellee.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF CITATIONS	ii
CITATIONS TO OPINIONS BELOW	1
FLORIDA STATUTES AND FLORIDA RULES OF APPELLATE PROCEDURE INVOLVED	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	2
JURISDICTION	3
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	3-10
CONCLUSION	10-11
CERTIFICATE OF SERVICE	11
APPENDIX	12

TABLE OF CITATIONS

CASES

Adams v. Texas, ___ U.S. ___, 65 L.Ed.2d 581 (1980)	5, 8, 10
Chapman v. California, 405 U.S. 1020 (1972)	3
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	3
Lockett v. Ohio, 438 U.S. 586 (1978)	5, 8, 10
Magill v. State, 386 So.2d 1138 (Fla. 1980)	1, 2, 4
Mincey v. Arizona, 434 U.S. 1343 (1977)	3
Nash v. Florida Industrial Commission, 389 U.S. 235 (1967)	4
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945)	3
Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948)	3

Whitus v. Georgia,
385 U.S. 545 (1967) 3

Witherspoon v. Illinois,
391 U.S. 510 (1968) 5, 6, 8, 10

OTHER AUTHORITIES

28 U.S.C. § 1257 . . . . . 3, 4, 5, 10

28 U.S.C. § 1257(3) . . . . . i, 3, 4

§ 924.08, Fla.Stat. 1, 4

Fla.R.App.P. 9.030(b)(1) 1, 4

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Florida upon which review is sought is reported as Magill v. State, 386 So.2d 1138 (Fla. 1980).

FLORIDA STATUTES AND FLORIDA RULES OF APPELLATE PROCEDURE INVOLVED

§ 924.08, Fla.Stat.:

> 924.08 Courts of appeal.--
>
> (1) Appeals from final judgments imposing the death penalty, passing upon the validity of a state or federal statute, or construing a controlling provision of the State or Federal Constitution shall be to the supreme court.
>
> (2) Appeals from final judgments in all other cases in which the Circuit Court has original jurisdiction and from all other final judgments except those which may be appealed directly to the Supreme Court or a Circuit Court shall be to the District Court of Appeal.
>
> (3) Appeals from final judgments in misdemeanor cases tried by County Courts shall be to the Circuit Court.

Fla.R.App.P. 9.030(b)(1):

> (b) Jurisdiction of District Courts of Appeal.
>
> (1) Appeal Jurisdiction. District courts of appeal shall review, by appeal:
>
> (A) final orders1/ or 2/ not directly reviewable by the Supreme Court or a circuit court;
>
> (B) non-final orders of lower tribunals as prescribed by Rule 9.130(a)(3); 9/
>
> (C) administrative action when provided by general law.2/

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case as set forth by Petitioner with the following exception. The Supreme Court of Florida issued a revised opinion in Petitioner's case on September 8, 1980, which deleted a sentence of the previous opinion and denied Petitioner's Motion for Rehearing (see Respondent's Appendix I). Magill v. State, 386 So.2d 1188 (Fla. 1980).

STATEMENT OF FACTS

Respondent does not accept Petitioner's Statement of Facts and would tender the following facts as set forth by the Supreme Court of Florida in its opinion in Magill v. State, 386 So.2d 1188, 1189 (Fla. 1980):

> This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and a sentence of death.
>
> The defendant, Magill, seventeen years of age at the time, robbed a small store, abducted the female attendant, raped her, and then killed her. An indictment was returned on January 6, 1977, and defendant was arraigned on January 17, 1977, at which time the public defender was appointed to represent the defendant. On February 1, 1977, the court ordered an examination of defendant to determine his competency to stand trial. On March 4, 1977, the defendant filed a motion for continuance on the ground that he had not yet received the reports of the appointed psychiatrists. The reports of the psychiatrists were filed on March 8 and March 14. The defendant filed a notice of intent to rely upon the defense of insanity on March 16; on the same day he filed another motion for continuance on the ground that he had been unable to take the deposition of the examining psychiatrists. The trial began on March 21, 1977.

JURISDICTION

The jurisdiction of this Court is asserted under 28 U.S.C. § 1257(3).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Section 1257(3) of 28 U.S.C. limits the jurisdiction of this Court to review by certiorari only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . ." Respondent respectfully submits that the decision rendered by the Supreme Court of Florida in Petitioner's case is not a "final judgment" within the meaning of 28 U.S.C. § 1257, and consequently, that the petition for writ of certiorari filed herein should not be granted. Mincey v. Arizona, 434 U.S. 1343 (1977, Rehnquist, Circuit Justice); Chapman v. California, 405 U.S. 1020 (1972); Whitus v. Georgia, 385 U.S. 545 (1967).

Traditionally, the final-judgment rule has precluded Supreme Court review "where anything further remains to be determined by a state court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court in the State." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945). This rule is not iron clad, however, and the Court has recognized certain exceptions to the final judgment rule. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

Petitioner has anticipated that certiorari review of his case at this time may be precluded by the final judgment rule (petition, page 11). This is because the Supreme Court of Florida vacated Petitioner's death sentence and remanded the cause to the trial court for further consideration con-

cerning the applicability of the death penalty. Magill v. State, 386 So.2d 1188, 1191 (Fla. 1980). Petitioner has therefore asserted that his case, as it now stands, can be considerec a final judgment within the meaning of 28 U.S.C. § 1257(3) because "the federal questions decided by the court in determining the Petitioner's conviction and in approving the propriety of the penalty phase proceedings before the jury cannot be raised again in the state courts." (petition, page 11).

However, this is not an accurate interpretation of Florida law and procedure.

Petitioner's arguments, as will be further discussed in this response, relate only to the sentencing phase of a bifurcated trial. At this point, Petitioner's death sentence has been vacated and it is mere speculation that Petitioner will receive a second death sentence upon remand to the trial judge. If Petitioner does in fact receive a second death sentence, he would be entitled to discretionary certiorari review by this Court under 28 U.S.C. § 1257(3). If, however, Petitioner receives a life sentence, not only would he still be entitled to a direct appeal of both the judgment and sentence to one of Florida's district courts of appeal, § 924.08, Fla.Stat.; Fla.R.App.P. 9.030(b)(1), but also, the issues herein would become moot. If Petitioner's appeal in the district court of appeal is unsuccessful, he still has the opportunity to obtain discretionary review in this Court under 28 U.S.C. § 1257. See Nash v. Florida Industrial Commission, 389 U.S. 235, 237 (1967), where certiorari was granted directly from a decision of a Florida district court of appeal because further state review as a matter of right was not available. Assuming arguendo that Petitioner has any federal claims, these claims will survive subsequent final judgments rendered either by the Supreme Court of Florida or

a district court of appeal. Thus, denial of certiorari review at this time would support judicial economy and the Court's goal of avoidance of piecemeal review. Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948).

II

Assuming arguendo that Petitioner is able to overcome the burden imposed upon him by the final judgment rule of 28 U.S.C. § 1257, Petitioner has still not presented a substantial federal question. Petitioner has asserted three reasons for granting the writ, however, only the first reason concerning an alleged Witherspoon violation merits discussion.

In Witherspoon v. Illinois, 391 U.S. 510, 522 (1968), the Court stated that the most which could be demanded from a venireman was "that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." n.21. In Lockett v. Ohio, 438 U.S. 586, 596 (1978), the Court upheld the exclusion for cause of jurors who could not follow the law and the instructions of the trial judge. The jurors "were thus properly excluded under Witherspoon, even assuming, arguendo, that Witherspoon provides the basis for attacking the conviction as well as a sentence in a capital case."

More recently, in Adams v. Texas, ___ U.S. ___, 65 L.Ed.2d 581, 589, the Court stated that a juror who was wholly unable even to consider imposing the death penalty, no matter what the facts of the given case were, cannot be considered capable of following the applicable state law. Petitioner has argued:

> The exclusion for cause of prospective jurors simply because they

> indicate that Defendant's age might affect their recommendation as to the imposition of the death penalty constitutes a plain violation of the Sixth and Fourteenth Amendment.

(petition, page 14).

However, the Supreme Court of Florida rejected this argument and concluded that Juror Bonner was properly excluded under Witherspoon because her objection to applying the death penalty to a defendant on the basis of age prevented her from voting for a conviction of first degree murder. "It was apparent from the examination that she would be unable to follow the law because of her bias or prejudice towards inflicting the death penalty upon those under the age of 21 years." This finding of the Supreme Court of Florida is amply supported by the record of the voir dire of Mrs. Bonner which is included here in its entirety:

> BY MR. OLDHAM: Thank you. Mrs. Bonner; is that correct?
>
> BY THE JUROR: Yes, sir.
>
> BY MR. OLDHAM: And did you hear the questions I asked Mrs. Keith?
>
> BY THE JUROR: Yes, sir.
>
> BY MR. OLDHAM: Okay. And have you heard or read anything about this case?
>
> BY THE JUROR: No, sir, I have not.
>
> BY MR. OLDHAM: Do you know any of the lawyers involved or the Defendant?
>
> BY THE JUROR: No, sir.
>
> BY MR. OLDHAM: Do you believe in the imposition of capital punishment where the law so provides for it?
>
> BY THE JUROR: Yes, sir.
>
> BY MR. OLDHAM: Okay. You understand that one of these charges is what's known as a capital offense, which is murder in the first degree, the premeditated killing of another?

BY THE JUROR: Yes, sir.

BY MR. OLDHAM: In other words, you plan to kill them and you do kill them.

BY THE JUROR: Yes.

BY MR. OLDHAM: The mere fact that this Defendant may be under the age of twenty-one, would that create any bar where you could not vote to find him guilty or you could not vote for the maximum penalty of death?

BY THE JUROR: Yes, sir, it would.

BY MR. OLDHAM: It would influence you?

BY THE JUROR: Because of his age, yes, sir.

BY MR. OLDHAM: Okay. Well, that's the important thing, so, you know--

BY THE JUROR: I know.

BY MR. PIERCE: May it please the Court, I think we're now running into exactly what I objected to, in Mrs. Bonner's answer to his question. I think that's why I objected and I think it's improper.

BY MR. OLDHAM: I don't think that my question to her was framed such--my question to her, whether it would be an absolute bar, but she said it would influence her. Isn't that right?

BY THE JUROR: May I ask a question? How old is the boy?

BY MR. OLDHAM: Well--

BY THE JUROR: I can't ask that? I'm sorry.

BY MR. OLDHAM: No, that's all right, that's fine. Well, let me ask you this. Would it be a complete bar to you voting him guilty of murder in the first degree, knowing he was under the age of twenty-one?

BY THE JUROR: I think it would.

BY MR. OLDHAM: In other words, knowing that he was under the age of twenty-one, even though the evidence showed that he was guilty

beyond and to the exclusion of a reasonable doubt, you could not vote to find him guilty of murder in the first degree; is that right?

BY THE JUROR: That's correct.

BY MR. OLDHAM: Would it make any difference whether it was this Defendant or any Defendant; would it apply just the same to him as it would to anyone else that you were trying?

BY THE JUROR: The age is what--the age.

BY MR. OLDHAM: Okay, so it's not this case. If it was anybody who was under twenty-one, you could not convict them, even if the evidence showed that--if death could result, you could not vote to find him guilty with the other eleven Jurors; is that right?

BY THE JUROR: That's right.

BY MR. OLDHAM: Your Honor, I think this Juror should be excused under Witherspoon versus the State of Illinois.

BY MR. PIERCE: May it please the Court, at this time we're raising an objection to his excuse, based upon the fact that we're taking the position that the law is not as set out in Witherspoon.

BY THE COURT: Objection overruled. I appreciate your candor, ma'am, and you're excused. You may go back in there.

(Thereupon, the Juror removed herself from the Jury Box).

(T 33-37) (Emphasis added) (Appendix II).

Thus, it is readily apparent that Juror Bonner was excluded not because she indicated that Petitioner's age "might" affect her recommendation of a death penalty, but rather because she had categorically stated that she would be unable to vote for a guilty verdict even if the evidence showed that he was guilty beyond the exclusion of a reasonable doubt. Witherspoon, supra; Lockett, supra; Adams, supra. Accordingly, Juror Bonner was properly excluded and Petitioner

has failed to present a substantial federal question.

Petitioner has also argued that "[i]t was not explained to any of the jurors that the Petitioner's age would have been a mitigating factor under § 921.141(6)(g) which they may have legitimately taken into consideration in arriving at their recommended disposition." (petition, page 12). However, this argument is also not supported by the record. Petitioner has cited to pages 25, 26, 28, 30, and 31 of the transcript of voir dire to support his argument. But the record reveals that all of the prospective jurors in at least the panel referred to in the petition were present during the following colloquy and subsequent explanation by the trial court:

> BY MR. OLDHAM: The mere fact that this Defendant may be under the age of twenty-one, would that influence you in voting for or against capital punishment?
>
> BY THE JUROR: No--
>
> BY MR. PIERCE: May it please the Court, at this time I'm going to object to that. The Court is aware there's probably mitigating circumstances and especially the way the State is proceeding. He's trying to eliminate that as a mitigating circumstance.
>
> BY MR. OLDHAM: No, I'm not, Your Honor. I understand that what he says could be true, but there could be a Juror that would absolutely not vote for a penalty of death for anyone that was under seventeen--I mean under twenty-one.
>
> BY THE COURT: As to that question, it's designed solely for that one reason, members of the Jury. Age may be a mitigating factor when it comes to that point. Of course, you understand that, but what he's solely asking the question to make sure that in your mind just because a person is under the age of twenty-one would be an absolute bar to oppose the death peantly [sic]. That's the purpose of the question asked.
>
> BY MR. OLDHAM: You understand

that, don't you, sir?

BY THE JUROR: Yes, sir.

(T 32-33) (Emphasis added)(Appendix II).

Again, Petitioner has failed to present a substantial federal question.

III

Petitioner's other two reasons why the Court should grant certiorari clearly relate to the sentencing phase of his trial. Therefore, as has already been shown, since Petitioner's death sentence was vacated, review of these arguments by certiorari at this point in time would be premature because what will happen at the subsequent proceedings in the trial court is merely speculation.

CONCLUSION

The opinion of the Supreme Court of Florida sought to be reviewed by this Petitioner is not a final judgment within the meaning of 28 U.S.C. § 1257, and thus, the jurisdiction of this Court has not been properly invoked. However, should the Court decide that the issue raised by the alleged Witherspoon violation is final, the question presented by Petitioner still presents no substantial federal question. This is because Juror Bonner clearly stated that she would be unable to vote for a guilty verdict even if Petitioner's guilt had been proven beyond every reasonable doubt--she was unable to follow the law of the State of Florida, and she was properly excluded under Witherspoon, supra; Lockett, supra; and Adams, supra.

Petitioner's second and third points relate to the sentencing phase of Petitioner's trial. Since Petitioner's death sentence was vacated by the Supreme Court of Florida, Petitioner has no sentence to review. Assuming arguendo that

Petitioner will be able to raise any substantial federal questions, these issues will survive for ultimate review by this Court regardless of whether Petitioner receives either a second sentence of death or a life sentence.

Petitioner's attempt to obtain piecemeal review of his case should not be permitted. Accordingly, Respondent respectfully requests that Petitioner's petition for writ of certiorari be denied.

Respectfully submitted:

JIM SMITH
Attorney General

Raymond L. Marky

RAYMOND L. MARKY
Assistant Attorney General

COUNSEL OF RECORD

Lawrence A. Kaden

LAWRENCE A. KADEN
Assistant Attorney General

OF COUNSEL

THE CAPITOL, 1502
Tallahassee, FL 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to PHILIP J. PADOVANO, ESQ., Attorney for Petitioner, P. O. Box 527, Tallahassee, FL 32302, by U. S. Mail this 7th day of January, 1981.

Raymond L. Marky

RAYMOND L. MARKY
Assistant Attorney General

COUNSEL OF RECORD

NO. 80-5852

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

PAUL EDWARD MAGILL,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

APPENDIX TO

Brief in Opposition to Petition

For Writ of Certiorari

Paul Edward MAGILL, Appellant,

v.

STATE of Florida, Appellee.

No. 31699.

Supreme Court of Florida.

May 8, 1960.

As Revised On Denial of Rehearing Sept. 8, 1960.

Defendant was convicted in the Circuit Court, Marion County, William T. Swigert, Sr., J., of murder in the first degree and was sentenced to death. Defendant appealed. The Supreme Court, Adkins, J., held that: (1) denial of a continuance to allow defendant to take the deposition of an examining psychiatrist was not an abuse of discretion; (2) a juror who would not vote for a conviction of first degree murder because of her objection to applying the death penalty to a defendant under the age of 21 years was properly excused for cause; (3) the prosecutor was properly allowed to cross-examine defendant during the sentencing phase as to defendant's thinking and acting out what occurred beyond the robbery; and (4) the trial judge was required to articulate mitigating circumstances considered by him.

Affirmed in part, vacated in part, and remanded.

England, C. J., concurred in the affirmance of conviction, but incurred as to the vacation of the sentence in result only.

1. Criminal Law ⇐586, 1151

Application for continuance is addressed to sound judicial discretion of trial court and denial of such motion should not be reversed by appellate court unless there has been palpable abuse of this judicial discretion, which appears clearly and affirmatively in record.

2. Criminal Law ⇐594(1)

In prosecution for first degree murder, denial of continuance to allow defendant to depose examining psychiatrist was not abuse of discretion.

3. Criminal Law ⇐730(1)

In prosecution for first degree murder, any misstatement by state attorney concerning function and duties of jury was cured by appropriate instructions from trial court.

4. Criminal Law ⇐1166.16

In first degree murder prosecution, unreported bench conferences held during voir dire examination of jury did not constitute reversible error.

5. Jury ⇐108

In first degree murder prosecution, prospective juror, who would not vote for conviction of first degree murder, regardless of evidence, because of her objection to applying death penalty to defendant on basis of his age, was properly excused for cause.

6. Witnesses ⇐277(4)

In sentencing phase of first degree murder prosecution, prosecutor was properly allowed to cross-examine defendant regarding his thoughts and actions during murder where defendant had testified as to his mental state before murder.

7. Criminal Law ⇐1170(2)

In sentencing phase of prosecution for first degree murder, trial court's refusal to allow defendant to answer question as to whether he felt remorse for crime was not reversibly erroneous where defendant was allowed to bring out remorse as mitigating factor in many other instances.

8. Criminal Law ⇐986(3)

Before imposing death sentence, trial judge was required to articulate any mitigating circumstances considered by him.

Michael J. Minerva, Public Defender, and Margaret Good, Asst. Public Defender, Tallahassee, for appellant.

Jim Smith, Atty. Gen., Michael H. Davidson, Charles A. Stampelos and Raymond L. Marky, Asst. Attys. Gen., Tallahassee, for appellee.

ADKINS, Justice.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and a sentence of death.

The defendant, Magill, seventeen years of age at the time, robbed a small store, abducted the female attendant, raped her, and then killed her. An indictment was returned on January 6, 1977, and defendant was arraigned on January 17, 1977, at which time the public defender was appointed to represent the defendant. On February 1, 1977, the court ordered an examination of defendant to determine his competency to stand trial. On March 4, 1977, the defendant filed a motion for continuance on the ground that he had not yet received the reports of the appointed psychiatrists. The reports of the psychiatrists were filed on March 8 and March 14. The defendant filed a notice of intent to rely upon the defense of insanity on March 16; on the same day he filed another motion for continuance on the ground that he had been unable to take the deposition of the examining psychiatrists. The trial began on March 21, 1977.

Defendant says the trial court committed reversible error in denying the motions for continuance. The psychiatric evaluations were performed to determine defendant's competency to stand trial. Those reports conclude the defendant was competent to stand trial and was sane at the time of the commission of the offense. The testimony of the psychiatrists would be inadmissible on the issue of guilt. In *Campbell v. State*, 227 So.2d 873 (Fla.1969), we held that the proffered testimony of a psychiatrist that the defendant, though able to distinguish between right and wrong, had a mental deficiency, and might not be able to conform his acts to the requirements of law, was not relevant to the question of whether or not the defendant was legally insane under the *McNaghten* test. Such testimony was, therefore, inadmissible.

[1, 2] In criminal cases an application for a continuance is addressed to the sound judicial discretion of the trial court, and the denial of such a motion should not be reversed by an appellate court unless there has been a palpable abuse of this judicial discretion. This abuse of discretion must clearly and affirmatively appear in the record. *Pittman v. State*, 51 Fla. 94, 41 So. 385 (1906). There has been no showing of palpable abuse of discretion and we therefore refuse to say the trial court committed error.

[3] Defendant next contends that during voir dire examination, the state attorney gave an erroneous explanation of the function and duties of the jury. This contention is without merit. The trial court instructed the jury as to their duties and functions, and these instructions were correct. Any misstatement by the state attorney during the voir dire examination was cured by appropriate instructions from the court.

[4] During voir dire examination of the jury several unreported bench conferences were held. We do not approve unreported bench conferences, but under the record of this case, the defendant has failed to show reversible error.

[5] Defendant says that the trial court committed error in excusing Juror Bonner for cause. In support of this contention defendant cites *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), where the principle is established that a prospective juror cannot be excused for cause in a capital case simply because the juror is opposed to the death penalty. However, *Witherspoon* also says the court may exclude a venireman whose objections to the death penalty interfere with his or her ability to follow the law in the case.

The record discloses that Juror Bonner would not vote for a *conviction* of first degree murder, regardless of the evidence, because of her objection to applying the death penalty to a defendant on the basis of age. It was apparent from the examination that she would be unable to follow the law because of her bias or prejudice towards inflicting the death penalty upon those under the age of twenty-one years. As Juror

Bonner was properly excused, this contention of the defendant is also without merit.

[6] During the sentencing phase of the proceedings, the defendant's attorney attempted to limit the scope of direct examination of the defendant to a time frame prior to the robbery so as to show his understanding of emotional conflicts and reasons for the robbery. Defendant says that, over repeated objections, the prosecutor was permitted to cross-examine him on his thinking and acting out what occurred beyond the robbery. Actually the prosecutor attempted to stress the aggravating circumstances during his cross-examination of defendant in the sentencing phase. In *State v. Dixon*, 283 So.2d 1, 7 (Fla.1973), we said:

> Another advantage to the defendant in a post-conviction proceeding, is his right to appear and argue for mitigation. The State can cross-examine the defendant on those matters which the defendant has raised, to get to the truth of the alleged mitigating factors, but cannot go beyond them in an attempt to force the defendant to prove aggravating circumstances for the State. A defendant is protected from self-incrimination through the Constitutions of Florida and of the United States. Fla.Const., art. I, § 9, F.S.A., and U.S.Const., Amend. V. In no event, is the defendant forced to testify. However, if he does, he is protected from cross-examination which seeks to go beyond the subject matter covered on his direct testimony and extend to matters concerning possible aggravating circumstances.

The defendant raised the matter of "Paul's emotional turmoil and problems" for consideration as a mitigating circumstance. Defendant claims that the exposition of that topic was strictly limited to his mental state prior to the robbery and that, therefore, the state exceeded the proper bounds of cross-examination when the state explored defendant's mental state in regard to the rape and murder of the victim. If the defendant opens the door as to his mental state prior to and during the commission of a crime, the state, during the sentencing procedure, is free to explore that area on cross-examination. Such cross-examination may be geared toward the mental attitude of defendant for a reasonable time after the commission of the crime.

[7] Defendant complains because he was not allowed to answer the question, "How do you feel at this time, Paul, concerning the acts that you have done?" The state of mind of a murderer during or immediately after the commission of the crime may be legitimately examined for remorse. His state of mind three or four months later, when facing the death penalty, may or may not be relevant. In any event, the record shows many instances where defendant was allowed to bring out remorse as a mitigating factor. The error if any, in not allowing defendant to once again express remorse is harmless.

[8] We next consider the propriety of the death sentence. The record clearly shows that defendant first robbed the victim and kidnapped her while in the process of fleeing the site of the robbery. He then took the victim to a wooded area and raped her. As they were returning to the car after the rape, the victim begged that she not be injured. Defendant realized that she would be able to identify him, so he shot her three times, "twice in the head and once in the chest." Defendant reaffirmed the details of a confession while on the stand at trial, although he attempted to recant the portion of his confession where he stated that he had killed the victim to avoid identification. The jury obviously believed the confession and not the recantation. This is well within their province. *Alvord v. State*, 322 So.2d 533 (Fla.1975); *Ford v. State*, 251 So.2d 562 (Fla.3d DCA 1971); *Wilson v. State*, 208 So.2d 479 (Fla.3d DCA 1968). The record shows that the victim was shot in the head and fell to the ground, after which defendant deliberately shot her twice more, once in the head and once in the chest. The chest shot was at such close range that it left powder burns. The record is clear that defendant had a cold, calculated design to effect the death of the helpless victim. This is evident from the

number of times defendant shot the victim with his .44 caliber pistol, the proximity of the muzzle of the pistol to the victim's chest, and defendant's statement to the police that he shot her to avoid identification and made sure that she was dead.

In *Meeks v. State*, 339 So.2d 186 (Fla. 1976), the victim was killed to avoid identification. Meeks was only twenty-one years of age, Magill was nearly eighteen. Meeks robbed a convenience store immediately preceding the murder. Magill robbed a convenience store and raped the victim preceding the murder. The only significant factual difference between *Meeks* and the case before us is that in *Meeks* the defendant did not rape his victim before he murdered her. The death penalty was awarded in *Meeks*.

Defendant's reliance upon *Halliwell v. State*, 323 So.2d 557 (Fla.1975), is not well placed. The defendant in *Halliwell* was involved in a love triangle which culminated in defendant's beating the husband to death after the husband had beat the wife. The motive was certainly different.

It is apparent that the trial judge used a reasoned judgment and, in the absence of sufficient mitigating circumstances, the death penalty was justified. The Court found that there were "no mitigating circumstances which outweigh the aforementioned aggravating circumstances." However, the court did not specifically list the mitigating circumstances which he may or may not have considered. Even though the trial judge may have considered some mitigating circumstances, he is charged with the further responsibility of articulating them, so as to provide this Court with the opportunity of giving a meaningful review of the sentence of death. As stated in *State v. Dixon*, 283 So.2d at 8:

> The fourth step required by Fla.Stat. § 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of roles provided by the statute.

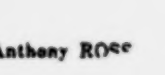
A most important safeguard is the propounding of aggravating and mitigating circumstances, which are determinative of the sentence imposed. Under the circumstances, it is necessary for us to set aside the sentence of death and remand the case to the trial judge for the purpose of making proper findings of fact and then, imposing an appropriate sentence. It is, of course, unnecessary to impanel another jury.

The judgment of conviction is affirmed. The sentence of death is vacated and the cause remanded to the trial judge for further proceedings consistent with this opinion.

It is so ordered.

BOYD, OVERTON and ALDERMAN, JJ., concur.

ENGLAND, C. J., concurs fully in the affirmation of Magill's conviction but in result only as to the vacation of Magill's sentence.



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MR. OLDHAM: And could I also presume that you presume this man to be innocent of these crimes that the Grand Jury has charged him with; is that correct?

BY THE JUROR: Yes, sir.

BY MR. OLDHAM: To -- until we show you otherwise, beyond and to the exclusion of a reasonable doubt. Now, do you believe in the imposition of capital punishment where the law so provides for it?

BY THE JUROR: Yes, I do.

BY MR. OLDHAM: The mere fact that this Defendant may be under the age of twenty-one, would that influence you in voting for or against capital punishment?

BY THE JUROR: No --

BY MR. PIERCE: May it please the Court, at this time I'm going to object to that. The Court is aware there's probably mitigating circumstances and especially the way the State is proceeding. He's trying to eliminate that as a mitigating circumstance.

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BY MR. OLDHAM: No, I'm not, Your Honor. I understand that what he says could be true, but there could be a Juror that would absolutely not vote for a penalty of death for anyone that was under seventeen -- I mean under twenty-one.

BY THE COURT: As to that question, it's designed solely for that one reason. members of the Jury. Age may be a mitigating factor when it comes to that point. Of course, you understand that, but what he's solely asking the question to make sure that in your mind just because a person is under the age of twenty-one would be an absolute bar to oppose the death peantly. That's the purpose of the question asked.

BY MR. OLDHAM: You understand that. don't you, sir?

BY THE JUROR: Yes, sir.

BY MR. OLDHAM: Thank you. Mrs. Bonner; is that correct?

BY THE JUROR: Yes, sir.

BY MR. OLDHAM: And did you hear the

questions I asked Mrs. Keith?

BY THE JUROR: Yes, sir.

BY MR. OLDHAM: Okay. And have you heard or read anything about this case?

BY THE JUROR: No, sir, I have not.

BY MR. OLDHAM: Do you know any of the lawyers involved or the Defendant?

BY THE JUROR: No, sir.

BY MR. OLDHAM: Do you believe in the imposition of capital punishment where the law so provides for it?

BY THE JUROR: Yes, sir.

BY MR. OLDHAM: Okay. You understand that one of these charges is what's known as a capital offense, which is murder in the first degree, the premeditated killing of another?

BY THE JUROR: Yes, sir.

BY MR. OLDHAM: In other words, you plan to kill them and you do kill them.

BY THE JUROR: Yes.

BY MR. OLDHAM: The mere fact that this Defendant may be under the age of twenty-one, would that create any bar where

you could not vote to find him guilty or you could not vote for the maximum penalty of death?

BY THE JUROR: Yes, sir, it would.

BY MR. OLDHAM: It would influence you?

BY THE JUROR: Because of his age, yes, sir.

BY MR. OLDHAM: Okay. Well, that's the important thing, so, you know --

BY THE JUROR: I know.

BY MR. PIERCE: May it please the Court, I think we're now running into exactly what I objected to, in Mrs. Bonner's answer to his question. I think that's why I objected and I think it's improper.

BY MR. OLDHAM: I don't think that my question to her was framed such -- my question to her, whether it would be an absolute bar, but she said it would influence her. Isn't that right?

BY THE JUROR: May I ask a question? How old is the boy?

BY MR. OLDHAM: Well --

BY THE JUROR: I can't ask that? I'm sorry.

BY MR. OLDHAM: No, that's all right, that's fine. Well, let me ask you this. Would it be a complete bar to you voting him guilty of murder in the first degree, knowing he was under the age of twenty-one?

BY THE JUROR: I think it would.

BY MR. OLDHAM: In other words, knowing that he was under the age of twenty-one, even though the evidence showed that he was guilty beyond and to the exclusion of a reasonable doubt, you could not vote to find him guilty of murder in the first degree; is that right?

BY THE JUROR: That's correct.

BY MR. OLDHAM: Would it make any difference whether it was this Defendant or any Defendant; would it apply just the same to him as it would to anyone else that you were trying?

BY THE JUROR: The age is what -- the age.

BY MR. OLDHAM: Okay, so it's not this case. If it was anybody who was under twenty-one, you could not convict them, even if the evidence showed that -- if death could result, you could not vote to find him guilty with the other eleven Jurors; is that right?

BY THE JUROR: That's right.

BY MR. OLDHAM: Your Honor, I think this Juror should be excused under Witherspoon versus the State of Illinois.

BY MR. PIERCE: May it please the Court, at this time we're raising an objection to his excuse, based upon the fact that we're taking the position that the law is not as set out in Witherspoon.

BY THE COURT: Objection overruled. I appreciate your candor, ma'am, and you're excused. You may go back in there.

(Thereupon, the Juror removed herself from the Jury Box).

BY THE COURT: Number eleven-B.

BY THE CLERK: Leland E. Buhl.

(Thereupon, the Juror was sworn by the Clerk, touching upon voir dire